SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 815

THE UNITED STATES OF AMERICA, APPELLANT

vs.

HARRY MURDOCK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS

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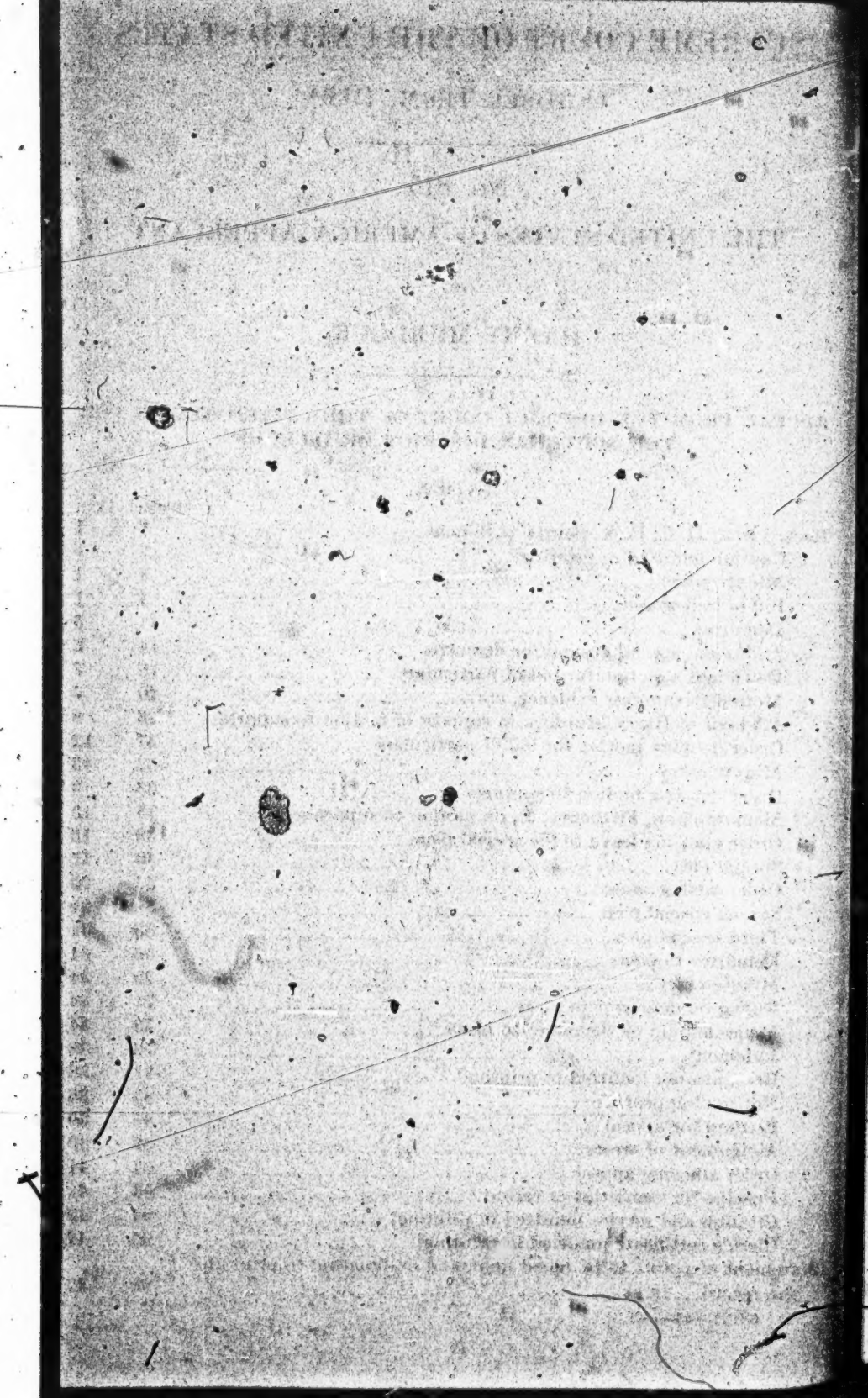


[Caption omitted.]

3 In United States District Court for the Southern District of Illinois, Southern Division.

Minute entry

Thursday, January 23, 1930

Court met pursuant to adjournment. Present, the Honorable Louis FitzHenry, judge.

The grand jurors come into open court and present indictment against the following-named person, to wit:

THE UNITED STATES vs. HARRY MURDOCK	No. 1680. Indictment. Vio. section 1111 (a) of rev. act of 1926 and sec. 146 (a) of rev. act of 1926.

(Indorsed:) A true bill, Hinman F. Strother, foreman.

4 In United States District Court for the Southern District of Illinois, Southern Division

UNITED STATES OF AMERICA, PLAINTIFF vs. HARRY MURDOCK, DEFENDANT	Docket No. 1680.

Bill of indictment filed Jan. 23, 1930

SOUTHERN DISTRICT OF ILLINOIS,
Southern Division, ss:

The grand jurors of the United States of America, impaneled, sworn, and charged in the District Court of the United States of America, within and for the said Southern Division of the Southern District aforesaid, at the term aforesaid, of the [illegible] in the year of our Lord nineteen hundred thirty, and [illegible] said Southern Division of the Southern District aforesaid, upon their oath present that Harry Murdock, late of the city of Nameoki, county of Madison, State of Illinois, heretofore [illegible] the defendant, whose true full name is unknown to the grand jurors except as aforesaid, throughout the calendar year 1926 was a citizen of the United States, who was in the real estate and [illegible] business, and whose residence and principal place of [illegible] in the city of Nameoki, county of Madison, [illegible] within the eighth internal revenue collection district [illegible] within said division of said judicial district [illegible] the jurisdiction of this honorable court, [illegible] 1926, said defendant made and filed [illegible] for the calendar year 1926, with the collector of internal revenue

the [illegible] eighth internal revenue collection district of Illinois, which said return was signed and sworn to by the said defendant, and in Schedule A (income from business or profession), of said return, in [illegible] business or profession, the sum of, to wit, twenty-four thousand ninety-one dollars and eighty-two cents ($24,091.82) and showing [illegible] business deductions in said Schedule A of said return, the sum of, to wit, fifteen thousand eight hundred sixty-two dollars and forty cents ($15,862.40), and showing the net income from business or profession to be the sum of, to wit, eight thousand two hundred twenty-nine dollars and forty-two cents ($8,229.42), which said sum of, to wit, eight thousand two hundred twenty-nine dollars and forty-two cents ($8,229.42), was shown by said defendant on the face of [illegible] return for the said calendar year 1927, under the caption "Income" and under the specific item "Income from business or profession", that the said defendant, in so filing his said return for the calendar year 1927, as aforesaid, concealed his [illegible] receipts from business or profession for said calendar year 1927 by the sum of, to wit, twelve thousand dollars ($12,000.00), alleged by the defendant to have been moneys paid out by said defendant during said calendar year 1927 to a person [illegible] unknown to said grand jurors; that afterwards, on, to wit, December 20, 1928, in pursuance of a written designation of Robert H. Lucas, Commissioner of Internal Revenue for the United States of America, giving his authority so to do, John R. Kirk, United States internal revenue agent in charge at Springfield, Illinois, issued a written summons to said defendant, Harry Murdock, and said written summons was regularly served personally on said defendant on, to wit, December 27, 1928, requiring him, the said defendant, to appear before the said United States internal revenue agent in charge at his office in room 305½ East Monroe Street at Springfield, aforesaid, on December 30, 1928, to give testimony and to produce books, for and to said commissioner, concerning said [illegible] moneys in the sum of, to wit, twelve thousand dollars ($12,000.00), by said defendant, and concerning the [illegible] and liabilities of the recipient or [illegible] of the computation, [illegible] imposed upon and due to the United States of America by an act of Congress entitled "An act to reduce and [illegible] which said act, and on, to wit, December 30, 1928, the said Harry Murdock did appear [illegible] the said [illegible] and [illegible] and [illegible] and

[illegible]

[illegible]

[illegible]

$12,000.00, alleged by the defendant to have been moneys paid out by said defendant during said calendar year 1928 to a person or persons unknown to said grand jurors; that afterwards, on, to wit, December 23, 1929, in pursuance of a written designation of Robert H. Lucas, Commissioner of Internal Revenue for the United States of America, giving him authority so to do, John R. Kirk, United States internal revenue agent in charge at Springfield, Illinois, issued a written summons to said defendant, Harry Murdock, and said written summons was regularly served personally on said defendant on, to wit, December 27, 1929, requiring him, the said defendant, to appear before the said United States internal revenue agent in charge at his office in room 308½ East Monroe Street, at Springfield aforesaid, on December 30, 1929, to give testimony and supply information for and to said commissioner concerning said payment of said moneys in the sum of, to wit, $12,000.00, by said defendant, and concerning the name and address or names and addresses of the recipient or recipients of such payment, for the purpose of the computation, assessment, and collection of income taxes imposed upon and due to the United States from such other person or persons by an act of Congress, approved May 29, 1928, entitled "An act to reduce and equalize taxation, provide revenue, and for other purposes," which said act of Congress is known as the revenue act of 1928; that on, to wit, January 9, 1930, the said defendant, Harry Murdock, did appear before said United States internal revenue agent in charge at the city of Edwardsville in the State of Illinois, in pursuance of said summons, but then and there refused to give testimony and supply information; that because he had full knowledge and information concerning said matter of said payment of said sum of, to wit, $12,000.00, said defendant was under a duty to appear before said John R. Kirk and give testimony and supply information concerning same, which said testimony and information is material for the purpose of the computation, assessment, and collection of income taxes; and that said defendant, notwithstanding his said duty, and although he then and there was required, under the provisions of said act of Congress, so to comply with said summons and give such testimony and information to said John R. Kirk, unlawfully did willfully fail to give such testimony and supply such information concerning said matter of said payment of said sum of, to wit, $12,000.00, to wit, on said January 9, 1930, in said Southern Division of said Southern District of Illinois, and in said eighth internal revenue collection district of Illinois, or at any other time or place; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

WALTER M. PROVINE,
United States Attorney.

(Indorsed:) A true bill, Hinman F. Strother, foreman.

(File indorsement omitted.)

10 [Omitted.]

(Copy)

11 In United States District Court

[Title omitted.]

Demurrer to indictment

(Filed Feb. 6, 1930)

And now comes Harry Murdock, above-named defendant, in his own proper person, and also by the undersigned attorneys, into court, and, having heard the said indictment read, says that the said indictment and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law, and that he, the said Harry Murdock, is not bound by law to answer the same. And, as particular specifications in support but not in limitation of this general demurrer, defendant cites the following:

1. The said indictment, and each count thereof, violates the sixth amendment to the constitution of the United States in that it fails to inform the defendant of the nature and cause of the accusation.

2. The indictment, and each count thereof, fails to inform the defendant of the nature and cause of the accusation in this, that it wholly fails and omits to recite or aver what, if any, information was requested of defendant, and what, if any, questions were propounded to defendant.

3. Inasmuch as each count of the indictment fails and omits to set forth the questions, if any, that were asked of defendant by John R. Kirk, United States internal revenue agent, or the answers, if any, that were given by the defendant, the allegation contained in each count that defendant "unlawfully did willfully fail to give such testimony" is a mere conclusion that this defendant is not, by law, required to answer.

4. The indictment, and each count thereof, is fatally defective because it fails to aver whether the defendant, in failing and refusing to answer questions put to him by John R. Kirk, United
12 States internal revenue agent, stood upon his rights as guaranteed by the fifth amendment to the constitution of the United States and stated that he could not answer such questions because his answers might incriminate him or subject him to criminal prosecution for violation of a penal statute of the United States or of the State of Illinois.

5. The indictment, and each count thereof, is otherwise vague, ambiguous, argumentative, indefinite, and uncertain.

And this the defendant is ready to verify; wherefore, for want of a sufficient indictment in this behalf, the said Harry Murdock prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment specified.

(Signed) Moore & Frech,
(Signed) Kaufe, Barry, & Lautenbach,
Attorneys for Defendant.

[File indorsement omitted.]

13 [Omitted.]

14 In United States District Court

[Title omitted.]

Additional special ground for demurrer.

(Filed Feb. 19, 1930)

Now comes Harry Murdock, the above-named defendant, by Moore & Fitch, and Keefe, Bandy & Listeman, his attorneys, and assigns the following additional ground of demurrer to the indictment in the above-entitled case, and respectfully asks this honorable court to consider this as one of the assignments or special grounds of the demurrer to the indictment, heretofore filed by this defendant:

The indictment is fatally defective and insufficient, because it shows, upon its face, by its averments, that Robert H. Lucas, Commissioner of Internal Revenue for the United States of America, and John R. Kirk, internal revenue agent in charge at Springfield, Illinois, did not petition and cause the United States District
15 Court for the Southern District of Illinois, Southern Division, by appropriate process, to compel the attendance of defendant before the said John R. Kirk, United States internal revenue agent in charge at Springfield, Illinois, for the purpose of supplying information, as required by the provisions of section 1122-A of the revenue act of 1926, which is as follows:

"If any person is summoned under this Act to appear, to testify, or to produce books, papers, or other data, the District Court of the United States for the District in which such person resides shall have jurisdiction, by appropriate process, to compel such attendance, testimony, or production of books, papers, or other data."

By failing and omitting to aver that the Commissioner of Internal Revenue for the United States of America, and the United States internal revenue agent in charge at Springfield, Illinois, followed the procedure required by the foregoing statute, which is in full force and effect, the indictment shows, upon its face that the representatives of the Commissioner of Internal Revenue have determined the questions of law involved in this case, and have determined for themselves, measured by their own ideas, the fact that defendant has refused to give information which the United States internal revenue agent in charge at Springfield, Illinois, thinks he is entitled to receive.

The procedure which was followed, as shown by the averments in both counts of this indictment, constitutes an erroneous and mistaken conception of the law applicable to this case.

The averments of the indictment, in showing the failure of
16 the Internal Revenue Department to follow the procedure prescribed by law, show that the defendant has been deprived of substantial rights, among them, the right to a judicial determina-

[File indorsement omitted.]

17 [Omitted.]

18 In United States District Court

[Title omitted.]

Defendant's motion for bill of particulars

(Filed Feb. 25, 1930)

Now comes Harry Murdock, the above-named defendant, by Moore & Fitch, and Keefe, Bandy & Listeman, his attorneys, and respectfully petitions this honorable court to enter an order requiring the prosecution in the above-entitled case, to furnish a written bill of particulars to this defendant, the said bill of particulars to contain the following information:

A transcript, or correct copy of whatever questions were asked of the defendant by Internal Revenue Agent John R. Kirk, or by Hon. Dwight H. Green, special attorney for the Internal Revenue Bureau, and whatever answers, if any, were given, by this defendant, to such questions, when this defendant appeared before said John R. Kirk and Hon. Dwight H. Green, at Edwardsville, Illinois, on the 9th day of January, A. D. 1930.

MOORE & FITCH,
KEEFE, BANDY & LISTEMAN,
Attorneys for defendant.

[File indorsement omitted.]

19 [Omitted.]

20 In United States District Court

[Title omitted.]

Motion to suppress evidence and to restrain its use at the trial

(Filed May 27, 1930)

Now comes Harry Murdock, the above-named defendant, by Moore & Fitch, and Keefe, Bandy & Listeman, his attorneys, and respectfully asks this honorable court to enter an order restraining and preventing the prosecution from using, at the trial of the above-

entitled cause, evidence obtained at a hearing held before John R. Kirk, internal revenue agent in charge at Springfield, Illinois, on the 9th day of January, A. D. 1930, in the office of Joseph Hotz, county clerk of Madison County, Illinois, at Edwardsville, Illinois, in the matter of the demand of the Government for this defendant to supply information as to the names of the recipients, and amounts of money paid by this defendant, in the years 1927 and 1928,
21 at which hearing, this defendant appeared, was sworn, placed on the witness stand, and interrogated. Defendant respectfully requests the suppression of the said evidence and that the prosecution be restrained and prevented, by the order of this court, from using such evidence at the trial of the above-entitled cause, for the following reasons:

1. The said evidence was obtained in violation of the defendant's constitutional rights, and in obtaining same constituted an unreasonable search and seizure of books, papers, and private personal information of this defendant.

2. The use of such evidence would constitute a violation of the fifth amendment to the Constitution, in that it would require this defendant to become a witness and to give evidence against himself.

3. This defendant was not required to supply the information requested by Internal Revenue Agent Kirk at said hearing.

4. This defendant was privileged, by the fifth amendment to the Constitution, from answering the questions asked by the said Internal Revenue Agent Kirk and his attorney, Mr. Green, at the said hearing.

5. The matters asked about were irrelevant, immaterial, and of no concern to the Internal Revenue Department of the United States.

6. The information sought at said hearing was not needed by the Internal Revenue Department, because the defendant offered to pay whatever income tax should be paid upon the part of defendant's income involved in said investigation.
22 7. This defendant was not required to supply information, or to answer questions, on account of the fact that the internal revenue agent was not a judicial officer, and the hearing was not held in a judicial forum, where the constitutional rights of the defendant could be passed upon and his privileges and immunities, as guaranteed by the Constitution, be protected.

8. Defendant attaches hereto his affidavit, setting forth in haec verba, a complete transcript of the hearing held in the office of Joseph Hotz, county clerk of Madison County, Illinois, at Edwardsville, on January 9th, A. D., 1930, and including all questions asked of the defendant, and all answers given by him, and the defendant respectfully requests that his attached affidavit may be considered along with this motion, as a part of it, and in support of it.

Moore & Fryer,
Kinney, Darby & Lieberman,
Attorneys for Defendant.

[Title omitted.]

Affidavit in support of motion to suppress

(Filed May 27, 1930)

Harry Murdock, first being duly sworn, makes the following statement:

I live at Namsoki, Illinois. I was subpoenaed to appear before John R. Kirk, internal revenue agent in charge at Springfield, Illinois, in the office of Joseph Hotz, county clerk of Madison County, Illinois, at Edwardsville, Illinois, on January 9th, 1930, and I did appear there at that time. I had been informed that the purpose of my appearance there was to place me under oath and to require me to supply information as to the names of the taxpayers who paid money from me, and the amounts of money paid by me to them, during the years 1927 and 1928, in order for my income for those years to be further examined, and my income tax to be passed upon by the Internal Revenue Department.

24 At that hearing I was asked many questions that I was privileged from answering, and that I refused to answer because my answers to such questions, or to any of them, would have incriminated and degraded me, and would have subjected me to prosecution in criminal cases in both this United States court, and in the Circuit Court of the State of Illinois within the jurisdiction in which I live. I include, herewith, immediately following this part of my affidavit, a correct stenographic transcript of the proceedings before the said John R. Kirk, internal revenue agent in charge at Springfield, Illinois, as held in the office of Joseph Hotz, county clerk of Madison County, Illinois, at Edwardsville, Illinois, on the 9th day of January, A. D. 1930, when I was supposed to be there, and was placed under oath and examined, which transcript sets forth all the questions that were asked of me, and all of the answers that I gave, together with the reasons which I gave for refusing to reply to certain of the questions, and which transcript shows that such questions were not asked of me in any court in which I could properly assert and claim my rights and privileges, and in which such rights and privileges, so guaranteed by the United States Constitution, could be protected. The said proceedings before Internal Revenue Agent Kirk were as follows:

(For transcript of testimony here inserted, see Motion Files.)

25 I further state that the foregoing, which has been [illegible] as a correct transcript of the proceedings [illegible] R. Kirk, internal revenue agent in charge at Springfield, Illinois, on the 9th day of January, A. D. 1930, [illegible] as appeared at said hearing.

I further state that an examination of the foregoing transcript will show that I was within my rights in refusing to answer the questions asked of me, in said hearing, and that the said questions were not asked in any court where my constitutional rights, or any other rights of mine, could be protected.

I further state that I was privileged from answering all the questions which the foregoing transcript shows I refused to answer, because of the fact that answers to these questions would have subjected me to criminal prosecution in the State courts of Illinois of the jurisdiction in which I reside, as well as in this United States District Court.

If my answers to such questions had shown that I was not entitled to deduct the sum of twelve thousand dollars ($12,000.00) from my taxable income for the year 1927, and the same sum of money from my taxable income for the year 1928, I would have been subjected to indictment and prosecution under the fraud sections of the Federal income tax law. When I made my income return *fro* the years 1927 and 1928 to the collector of internal revenue, I honestly believed that I was entitled to deduct from my taxable income the said sum of twelve thousand dollars ($12,000.00) for each of these two years, and I deducted the said sum, and charged it off as expense, because it was money that I had expended, that I had not kept, that was no part of my income, and that I believed should not be considered a part of my taxable income.

I further state that when I appeared before Internal Revenue Agent Kirk, I offered to pay income tax on the said sums of money, as shown by the foregoing transcript of the proceedings had before the said internal revenue agent, and I am still ready and willing to pay income tax upon same, provided that the Internal Revenue Department of the United States shall hold that I am liable for the payment of income tax upon the two sums of twelve thousand dollars ($12,000.00), above mentioned. I did not intend to defraud the United States Government when I deducted the said sums of money from my taxable income for the years 1927 and 1928, and I charged the said sums of money off for the sole reason that they were paid by me to other persons, but I can not divulge the names of the persons to whom the said sums of money were paid, or the purposes for which they were paid, because my answers to said questions, and my revealing of such information, would, as above set forth, subject me to criminal prosecution, and my said answers would incriminate me, and would cause me to give testimony against myself, and would deprive me of the protection accorded citizens of the United States by the fifth amendment to the Constitution of the United States.

I have believed by my reasoning, and believe the fact to be, that the internal revenue laws of 1926, and the internal revenue law of 1928, which makes the income tax laws, which authorized Internal Revenue Agent Kirk to hold the said hearing to which I was subpoenaed, and at which I was required to testify, do not

I further state that the foregoing transcript shows that the questions which were asked of me concerned gambling operations alleged to have been conducted by me, during the years 1931 and 1932, and that, if I had answered the said questions, I would have incriminated and degraded myself in respect to certain of the penal statutes of the State of Illinois, would have subjected myself to criminal prosecution in courts of the State of Illinois, and would have subjected myself to conviction upon evidence which I had been compelled to furnish against my will, in violation of the plain provisions of the fifth amendment to the Constitution of the United States; that my refusal to answer the said questions was made in good faith, and on account of the fact that answers to such questions would have subjected me to criminal prosecution in the State courts of Illinois, and not because of any desire on my part to conceal facts concerning my income from the Internal Revenue Department.

28 I further state that I was not asked any of these questions in a court of law, where the court could hear my claim of privilege from answering, and render a judicial determination of whether or not I was required to answer such questions; that I was not in a forum where my constitutional rights could, in any way, be protected, when I attended the said hearing before Internal Revenue Agent Kirk, and that this is the first opportunity which I have had to appeal to a United States court of competent jurisdiction to pass upon my claim of being privileged from answering the questions set forth in the foregoing transcript, on account of the fact, as then declared, and now again asserted by me, that my answers to such questions would tend to incriminate and degrade me, and would subject me to indictment, prosecution, and conviction in criminal courts of the State of Illinois, and in the United States District Court for the Southern District of Illinois, and would cause evidence to be used against me in such criminal prosecution, which had been wrung from me against my will, in the said hearing before Internal Revenue Agent Kirk, and which evidence would be used against me in such criminal prosecutions in violation of the plain provisions of the Constitution of the United States.

I further state that I have been indicted in the above-entitled cause, under certain sections of the United States Internal Revenue

law of 1926 and the law of 1928, for failing and refusing to supply information to the United States Department of Internal Revenue, as required by the said laws, and by regulations of the said department, and I have also been informed that in order to prove the charges contained in the said indictment, and to bring about my conviction, the United States district attorney, for the Southern District of Illinois, together with his assistants in charge of the prosecution in the above-entitled case against me, intends to introduce as evidence for the Government, at the trial of the above-entitled case, the foregoing transcript of the proceedings held before Internal Revenue Agent Kirk, in the hearing at Edwardsville, Illinois, and intends to prove, at said trial, that the above set forth questions were asked of me by the said Internal Revenue Agent Kirk, and the attorney, Mr. Green, and that I refused to answer the said questions, and, for that reason, failed and refused to supply information, as required by certain sections of the United States internal revenue law of 1926 and 1928.

I, therefore, respectfully appeal to this honorable court to enter an order restraining and enjoining the prosecution, including the United States attorney for the Southern District of Illinois, and his several assistants, from using in evidence in the trial of the foregoing case any facts which were procured by Internal Revenue Agent Kirk, or any other person connected with the United States Internal Revenue Department, at said hearing held by United States Internal Revenue Agent Kirk, at Edwardsville, Illinois, in the office of Joseph Hotz, county clerk of Madison County, Illinois, on the 9th day of January, A. D. 1930, and to suppress all evidence obtained by means of placing me under oath, at said hearing, at said time and place, before Internal Revenue Agent Kirk, in order that such evidence may not be used at the trial of the above-entitled case, and in order that I may thereby be saved and protected from offering evidence against myself, and in order that I may have the protection to which I am entitled, under the fifth amendment to the Constitution of the United States.

HARRY MURDOCK.

[*Duly sworn to by Harry Murdock; jurat omitted in printing.*]
[File indorsement omitted.]

In the United States District Court

[Title omitted.]

Order denying motion for bill of particulars

(May 27, 1930)

And now on this 27th day of May, A. D., 1930, comes the United States the plaintiff in this case by Walter M. Provine, Esq., United States attorney for the Southern District of Illinois and comes also

the defendant Harry Mustick, in his own proper person and by H. J. Bandy, Esq., his attorney, and the said defendant heretofore entered a motion for a bill of particulars herein, which the court having heard and duly considered the same, it is ordered that said motion be, and is hereby denied.

And the said defendant being arraigned on the indictment herein for plea thereto, says that he is not guilty as therein charged.

32 In the United States District Court

[Title omitted.]

Minute entry

(June 10, 1930)

Come now the parties to this cause and by their respective attorneys and the court having heard the arguments of said attorneys on the motion of the defendant herein to suppress the evidence taken before the internal revenue agent, and not being fully advised in the premises, takes the same under advisement.

33 In United States District Court

[Title omitted.]

Order denying motion to suppress

(June 21, 1930)

The court having duly considered the motion to suppress the evidence heretofore filed herein, it is ordered that the said motion be and it is hereby denied. To which ruling of the court the defendant, by H. J. Bandy, Esq., his attorney, then and there duly excepted.

34 [Omitted.]

35 In United States District Court

[Title omitted.]

Bar: Defendant's motion to suppress

(Filed June 21, 1930)

The indictment charges the defendant with having violated section 146 of the revenue act of May 29, 1928 (U. S. C., title 26, § 2146), and also section 1104 of the revenue act of 1926 (U. S. C., title 26, § 1047), in that the defendant wilfully refused to supply

information to a revenue agent concerning certain substantial payments which he made to other persons, in violation of the provisions of the statutes just referred to.

The defendant has heretofore entered his plea of not guilty and moves to suppress certain evidence taken at a hearing duly had before a revenue agent. The evidence is attached to the motion to suppress. An examination of this evidence shows that the hearing was had for the purpose of examining the defendant with reference to certain deductions which he had taken in his income-tax schedule for moneys paid to other persons in the conduct of his business. Sufficient facts are disclosed to tend to show that when the defendant made out his income-tax schedule for the years 1927 and 1928
36 he was engaged in an illegal and unlawful business. When he was asked to whom the money was paid and for what purpose, he refused to answer, claiming that to do so might incriminate him. He thereafter claimed his constitutional rights under the 5th amendment to the Constitution.

Prior to examination, in his presence, his counsel stated that at the time of the execution of the schedule he thought he was entitled to take deductions for the various sums of money involved, but that if he was not, he was willing to have the schedule amended and pay the income tax upon the said sums, and that he refused to answer the interrogatories put to him chiefly upon the probability of his own prosecution for a violation of the criminal laws of Illinois.

The evidence sought to be suppressed clearly establishes that the defendant willfully refused to give the information desired. In other words, the evidence or the information sought to be procured and which, if given, might have incriminated the defendant under the State laws, was not given and is not involved in this prosecution, so far.

In effect the motion is to procure the suppression of evidence for which no immunity under the 5th amendment is claimed; that is, the refusal to give information. It stands admitted in the record, freely, that he did refuse to give evidence. Whether he was justified in refusing to give the evidence can not be adjudicated upon a mere motion of this character. Only the fact of refusal to answer the questions propounded is shown by the transcript
37 attached to the motion. This fact might also be established by the evidence of the witnesses present, but even that is unnecessary as the defendant admits it.

In the light of these views, it is unnecessary to pass upon the many [illegible] questions of law raised with reference to the privileges and immunities of witnesses. We conclude that the motion to suppress must be denied and

It is [illegible] ordered.

[illegible] Judge.

38 In United States District Court

[Title omitted.]

Order granting leave to file special plea

(July 1, 1930)

Comes now the defendant herein in his own proper person and by H. J. Bandy, Esq., his attorney, and on his motion leave is hereby granted said defendant to file a special plea herein. Special plea filed.

39 [Omitted.]

40 In United States District Court

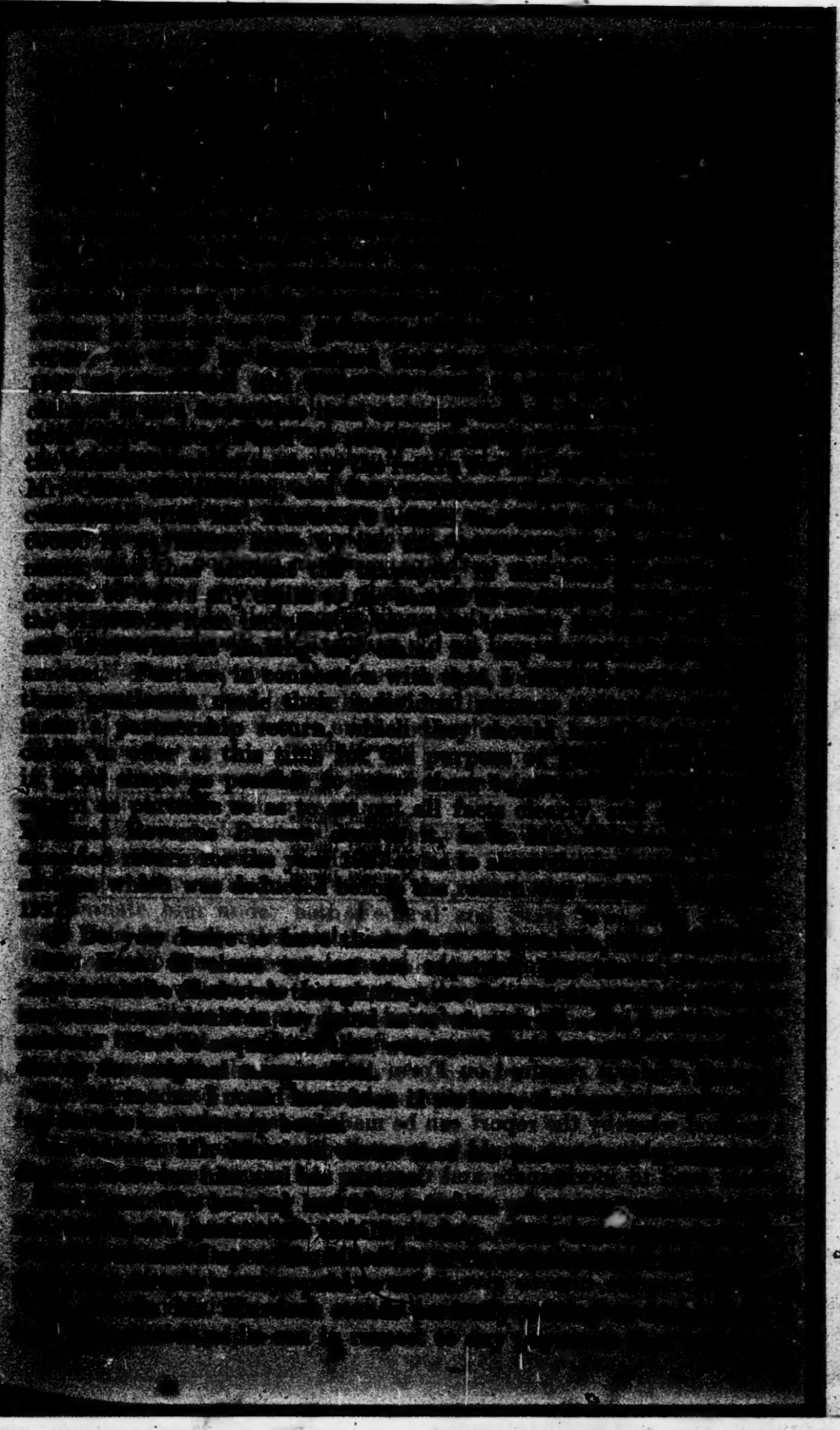
[Title omitted.]

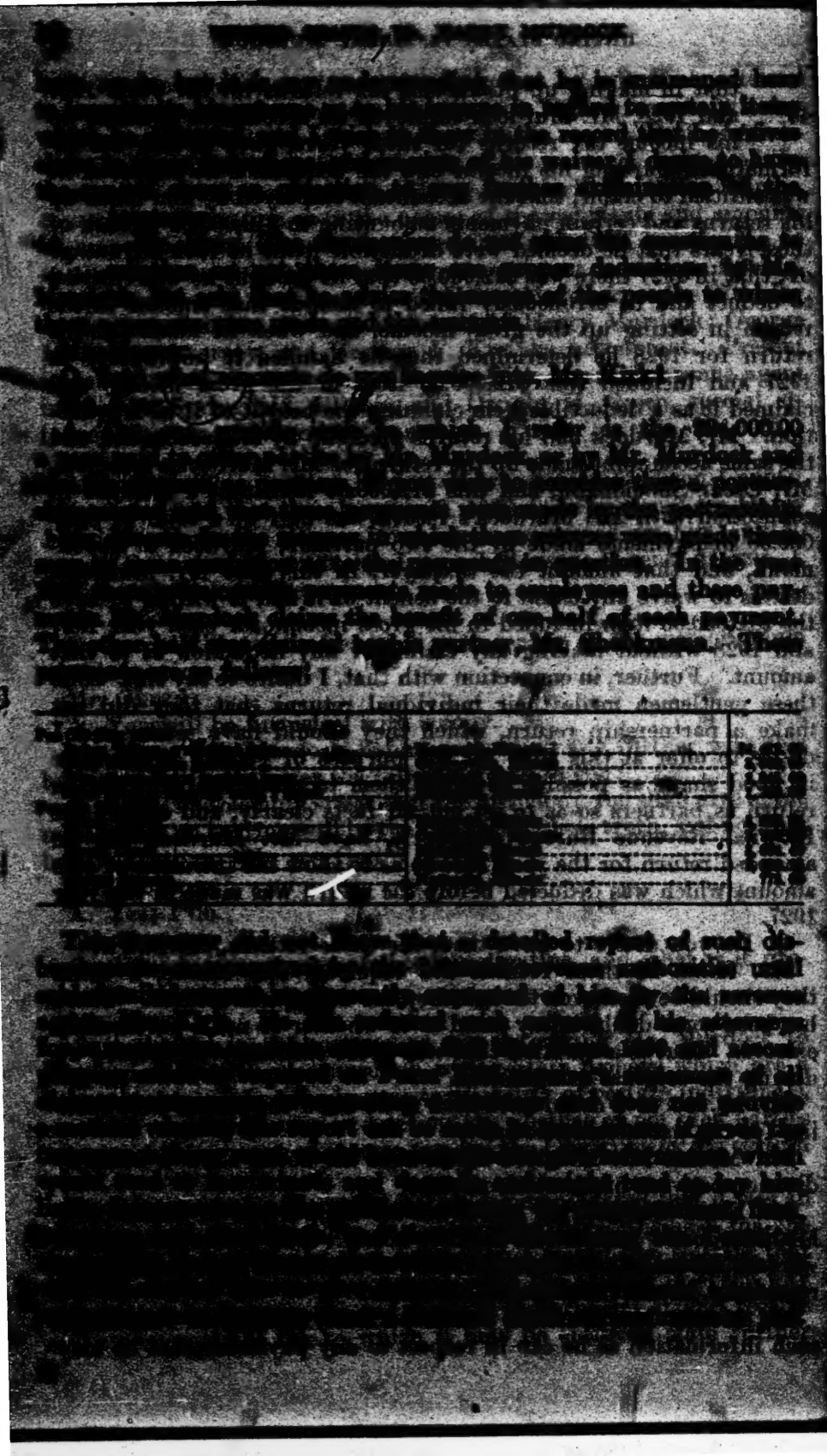
Special plea

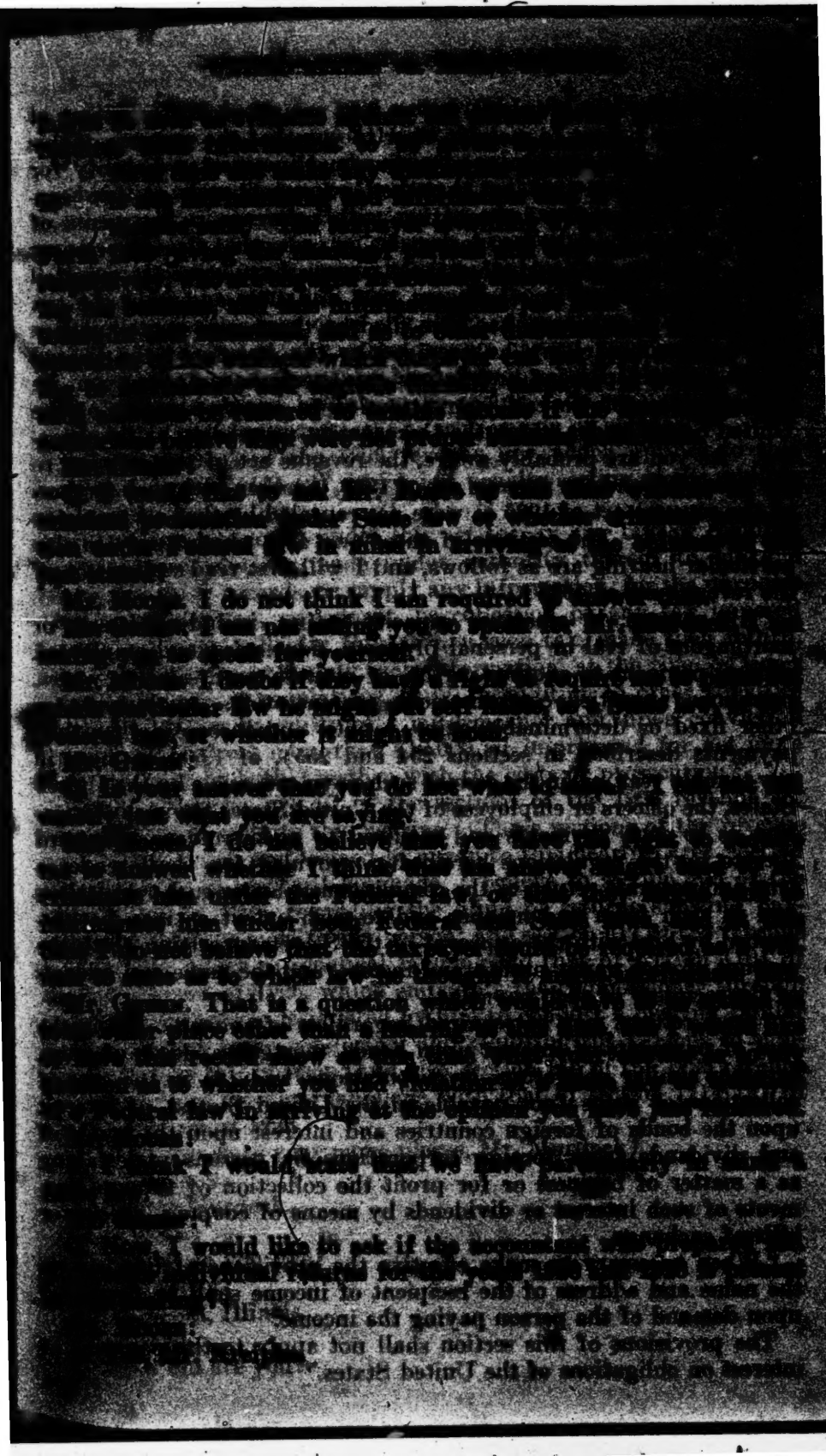
(Filed July 1, 1930)

And now comes the said Harry Murdock, above-named defendant, in his own proper person into court, and having heard the said indictment read, says that the United States ought not further to prosecute this indictment against him, the said Harry Murdock, because he says that if he had answered the questions that were asked of him by John R. Kirk, United States internal revenue agent in charge at Springfield, Illinois, and by Mr. Dwight H. Green, special attorney for the Bureau of Internal Revenue, at the hearing held in Edwardsville, Illinois, on the 9th day of January, A. D. 1930, at which time and place this defendant was placed under oath by the said John R. Kirk, United States internal revenue agent in charge at Springfield, Illinois, and interrogated for the purpose of compelling this defendant to supply information, as alleged in the indictment, and each count thereof, pursuant to an act of Congress, approved February 26th, 1926, and the act of 1928, entitled "An act to reduce and equalize taxation, to provide revenue, and for

41 other purposes," this defendant would have given information which would have incriminated and degraded him and would have compelled him to become a witness against himself in a criminal case, in violation of the fifth amendment to the Constitution of the United States and would have caused him to be prosecuted for crimes in this Federal court for violations of the laws of the United States, as shown by the answers and statements [illegible] by this defendant, as follows:







[illegible] VS. HARRY MIRBOOK

[illegible] before you are asked any questions of [illegible] clear to you that the purpose of this [illegible] personal income tax liability for [illegible] under at this hear- [illegible] with reference to payments of [illegible] in order that the Government [illegible] have correctly reported [illegible] 1927 and 1928 and paid the tax [illegible] if returns have been filed by them persons to prepare [illegible] such a return as provided by the statute of the United [illegible] for such purposes, and before any questions are asked you, we [illegible] to call your attention to certain statutes of the United States under which the Government proceeding at this hearing. As you are probably aware, the revenue act of 1926 applies to the year 1927 and the revenue act of 1928, together with such sections of the revenue act of 1926 as were not repealed by that act apply to the year 1928. The sections of these two acts which apply to this particular hearing are as follows, and I will first read section 256 of the revenue act of 1928:

"All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, and employers, making payment to another person, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income (other than payments described in sections 164 and 165), of 1,500 or more in any taxable year, except in the case of such payments made by the United States, the officers or employees of the United States having information as to such payments and required to make returns in regard thereto by the regulations hereinafter provided for, shall render a true and correct return to the commissioner, under such regulations and in such form and manner, and to such extent as may be prescribed by him, with the approval of the Secretary, setting forth the [illegible] and income, and the name and address [illegible] regardless of amounts, (1), in the [illegible] bonds, mortgages, deeds of trust, [illegible] and (2) in the case of [illegible] United States, of interest [illegible] coupons and interest upon the bonds of [illegible] foreign [illegible]

[illegible] shall not apply to the payment of [illegible] obligations of the United States."

47

Mr. Munnoch:
A. 47.
Mr. Gruner:
Q. Has your home always been in Nameoki, Illinois?
Mr. Munnoch:
A. Yes, sir.

48 Q. Mr. Gruner: Where did you live prior to the time you came to Nameoki?
A. Mr. Munnoch: East St. Louis.
Q. Mr. Gruner: How long have you lived in Nameoki?
A. Mr. Munnoch: About eight years.
Q. Mr. Gruner: What has been your business there?
A. Mr. Munnoch: Real estate for the last two years.
Q. Mr. Gruner: Have you just been in real estate business the last two years?
A. Mr. Munnoch: Yes, sir.
Q. Mr. Gruner: You mean by that the years 1928 and 1929?
A. Mr. Munnoch: Well, I started in 1926.
Q. Mr. Gruner: Then you have been in real estate business three years?
A. Mr. Munnoch: About that.
Q. Mr. Gruner: Has that been your only business?
A. Mr. Munnoch: I refuse to answer.
Q. On what ground?
A. On the ground that I might give information that might incriminate and degrade myself.
Q. Do you have in mind the violation of a Federal law or State law when you state your ground is that you might give information to incriminate or degrade yourself?
A. Against a State law.
Q. And not against a Federal law? Is that right, Mr. Munnoch?
A. Not that I know of.

49 Mr. Morgan: I object to that question on the ground that it is immaterial; that the Government has no right to insist upon an answer as to what would be a State or Federal statute in connection with which the witness might tend to incriminate himself.
Mr. Gruner:
Q. Mr. Munnoch, did you operate or have supervision over the operation of any slot machine, coin operated machines, during the years 1927 and 1928?
Mr. Munnoch:
A. Vending machines.
Q. You mean gambling machines?
A. I think that's what they are called.
Q. How many machines did you have in operation during the years 1927 and 1928?
A. I can't tell you off-handed.
Q. Approximately?
A. Around 125, or something like that.

Q. Madison County alone?

A. Yes.

Q. What towns in Madison County?

A. I refuse to answer.

Q. On what ground?

A. That I might incriminate or degrade myself.

Q. And in stating you refuse to answer that you might incriminate or degrade yourself, you have in mind the violation of a State law and not a Federal law?

A. Yes.

Mr. Gamax:

Q. You could not operate those machines without the consent of certain public officials, could you, Mr. Murdock?

Mr. Mumbock:

A. It has been done.

Q. Where was it done without the consent of public officials?

A. It has been done other places.

Q. Is it being done without the consent of public officials?

Mr. Moom: I object to that question as being too broad in its scope, as it is not particular enough in its inquiry.

Mr. Gamax:

All right; strike out that question.

Q. Mr. Murdock, are you at the present time operating any slot machines without the consent of public officials?

Mr. Mumbock:

A. I refuse to answer.

Q. On what ground?

A. That I might give information which might incriminate or degrade myself.

Q. And in stating that you refuse to answer because you might give information which might incriminate or degrade yourself, you have in mind the violation of a State law and not a Federal law?

A. Yes.

Q. In 1927 Mr. Murdock, were you operating slot machines without the consent of public officials?

A. I refuse to answer.

Q. On what ground?

A. Same ground.

Q. Same as the ground.

A. That I might give information which might incriminate

Mr. Mumbock: I am refusing to answer on the ground that I might incriminate or degrade yourself you have in mind the violation of a State law and not a Federal law, Mr. Murdock, is that right?

A. Yes.

Q. Did you in 1938 operate slot machines without the consent o
public officials?

A. I refuse to answer.

Q. On what ground?

A. On any ground.

Q. Refuse on the ground.

A. I refuse to degrade myself.

Q. Do you refuse to answer on the ground that you might
yourself you have in mind the violation of a

Q. The returns for the years 1937 and 1938 were
made out by Mr. Knipke, who is present at this hearing,

Q. You gave him the information from which he made up the

Q. Did Mr. Knipke, to your knowledge, gain any information
making up your returns for the years 1937 and 1938
other than yourself?

A. I don't think he did.

Q. Did Mr. Knipke in making out your
[illegible] in this item of gross income,
your 1937 return, an amount of $24,000.00,
working papers in connection with your
be used in making up your return this
you we possess an explanation? To whom

A. I refuse to answer.

Q. On what ground?

A. On any ground. It might incriminate myself.

Q. Your refusal for your refusal to answer you have in
violation of a State law and not the violation of a Federal

Q. Of the amount of $24,000.00 did you pay $2,500.00 or more
to any person during the year 1937?

A. I refuse to answer on behalf of the payments.

Q. To whom which you say you paid, did you pay
any single person during the year 1937?

Q. On what ground?

A. I might incriminate or degrade myself.

Q. And in stating that your ground for refusal to answer is that you might incriminate or degrade yourself, you have in mind the violation of a State law and not the violation of a Federal law? Is that right?

A. Yes sir.

Mr. Moore: There is an item of $9,250.00 that is included in that deduction as a matter of incidental expenses without classification that was expended by Mr. Murdock himself in connection with the business in which he was engaged.

Mr. Gamm:

Q. Was that expended in connection with your slot machine business or real estate business?

Mr. Murdock:

A. Slot machine business. That was spent by me in going around with my customers trying to find locations for their machines.

Mr. Moore:

Q. What sort of expense was that, Mr. Murdock?

Mr. Murdock:

A. A man running my business can not walk into a soft drink parlor without buying the house a couple of drinks.

Mr. Gamm:

Q. Did you keep a record of these expenditures?

Mr. Murdock:

A. Yes, sir.

Mr. Gamm:

Q. And by buying a drink for the "house" you mean for whoever was in there?

Mr. Murdock:

A. Yes, sir.

Q. That is what you might call promotion of "good will"?

A. Yes, sir.

Q. Mr. Knox: Mr. Murdock, I believe it is your statement that included in the sum of $28,175.14 deducted on your return in the year 1928 is an item of one-half of $12,000.00 of the $24,000.00 annual payment which has been referred to; that is one-half of this amount was deducted on your return and one-half on the return of Mr. Shoolroman. There has been submitted an amount of $7,646.19 as representing your one-half of amounts paid to certain individuals in 1928. Do you mean to state that this amount of $15,292.38 is a portion and all included in the $24,000.00?

Mr. Murdock: I refuse to answer.

Q. Mr. Knox: I will ask you as to the $24,000.00 paid during the year 1928 and the $24,000.00 paid during the year 1927, by the firm of yourself and Mr. Shoolroman, to state the names of the recipients and amounts paid to each.

A. I refuse to answer.

Mr. Green:

Q. On what ground?

Mr. Murdock:

A. I might incriminate or degrade myself.

Mr. Green:

Q. And in stating your ground for refusal to answer that you might incriminate or degrade yourself, you have in mind that violation of a State law and not the violation of a Federal law?

Mr. Missouri:

A. Yes, sir.

Q. Now, Mr. Murdock, there seems to be some discrepancy in the figures which have been mentioned here, and for the purpose of clarifying the record let us again state those figures. Out of the total of $28,175.14 you show and wish to account for a part of that total in this manner, namely: $7,646.19, which represents your half of certain payments made to individuals, whose names and amounts were read into the record here by your attorney, Mr. Missouri. That is right so far, is it?

Mr. Missouri:

A. Yes.

Q. And for the sum of $8,529.00, which represents half of a total of $17,058.00, paid by yourself and your partner, Mr. [illegible], as miscellaneous expenses such as buying of drinks in [illegible] customer's place. That accounts for $16,175.19 out of the figure of $28,175.14. Is that right?

A. That is right.

Q. As to the balance, which is approximately $11,999.95, you wish to get on record record as refusing to state the names of the persons or recipients of that money or amounts paid such persons?

A. Yes, sir.

Q. And you refuse to answer on the ground that such answer may tend to incriminate or degrade you?

A. Yes.

Q. Mr. Murdock, do you know a man by the name of George [illegible]?

A. Yes.

Q. How long have you known him?

A. 15 years.

Q. Do you know what business he is in?

A. No, I do not.

Q. Has your association with him been of a social or business nature?

A. Social.

Q. Have you ever had any business transactions with [illegible]?

A. I refuse to answer.

Q. On what ground?

A. [illegible] ground.

to which you refuse to give or reveal the names of the recipients of amounts paid such recipients, did you pay any of that $12,000.00 to George Little?

A. I refuse to answer.

Q. On what ground?

A. I might give information that might incriminate myself.

Q. In stating your ground for refusal to answer that you might give information that might incriminate yourself, you have in mind the violation of a State law and not the violation of a Federal law?

A. Yes.

Q. Have you any questions which you might wish to ask at this time, Mr. Moore?

Mr. Moore.

A. I have no questions that I desire to ask.

56 And this the said Harry Murdock is ready to verify.

Wherefore, he prays judgment, and that he may be dismissed and discharged by this court from the said premises in the said indictment above specified.

HARRY MURDOCK, *Defendant*,
MOORE & FITCH,
KAYSER, BAIRD & EARLEMAN,
Attorneys for Defendant.

STATE OF ILLINOIS,
County of Madison, ss:

Harry Murdock, the defendant in the above-entitled prosecution, [illegible] that the foregoing plea is true in substance and matter [illegible] and that his refusal to answer the questions set forth in the foregoing transcript was not because of any willful refusal or failure to supply information, as alleged in the indictment, but was on account of the fact that answers to said questions would have

In United States District Court

[Title omitted.]

Order [illegible]

(Oct. 1, 1930)

And now on this 1st day of October, A. D. 1930, comes the United States the plaintiff in this case by Walter M. Provine, Esq., United States attorney for the Southern District of Illinois, and comes the defendant Harry Murdock, in his own proper person, and by H. J. Bandy, Esq., his attorney, and the United States having filed a demurrer to the plea of defendant herein, it is ordered by the court that the setting herein for October 6, 1930, be, and is hereby cancelled. It is further ordered by the court that the demurrer to plea by agreement of counsel is hereby set for hearing on October 17, 1930.

59 In United States District Court

[Title omitted.]

Second special plea

(Filed Oct. 13, 1930)

And now comes the said Harry Murdock, above-named defendant, in his own proper person, into court, and having heard the said indictment read, says that the United States of America ought not further to prosecute this indictment against him, the said Harry Murdock, because he says that if he had answered the questions that were asked of him by John R. Kirk, United States internal revenue agent in charge at Springfield, Illinois, and Mr. Dwight H. Green, special attorney for the United States Bureau of Internal Revenue, at the hearing held in Edwardsville, Illinois, on the ninth day of January, A. D. 1930, at which time and place this defendant was [illegible] under oath by the said John R. Kirk, United States internal

[illegible] February 20th, 1956, [illegible]
[illegible] would have given information [illegible] and degraded him, and have [illegible] himself in a criminal [illegible] to the Constitution of the [illegible] and [illegible] of the Constitution of the [illegible] of the United States, for violations of various criminal laws of the State of Illinois, as shown by the [illegible] of the questions asked of this defendant by said John M. Kirk, [illegible] revenue agent [illegible] this defendant, a copy [illegible] special plea filed in this cause by this defendant, and which transcript included in said first special plea is, by reference, made a part of this second special plea.

And this defendant, Harry Murdock, is ready to verify.

Wherefore, by reason [illegible], and that he may be dismissed and discharged from [illegible] in the said indictment above specified.

Harry Murdock,
Defendant.

Moore & Finch,
H. J. Bandy,
Attorneys for Defendant.

61 State of Illinois,
County of Madison, ss.

Harry Murdock, the defendant in the above entitled prosecution, makes oath and says that the foregoing special plea is true in substance and fact, and that his refusal to answer the questions set forth in the transcript of testimony included in the first special plea filed by this defendant, and, by reference, made a part of this second special plea, was not because of any wilful refusal or failure on the part of this affiant to supply information, as alleged in the indictments, but was on account of the fact that answers to said questions would have incriminated and degraded this affiant, and have subjected him to punishment in the courts of the State of Illinois, for violation of various penal statutes of said State.

Harry Murdock.

Subscribed and sworn to before me this 12th day of October, A. D. 1956.

A. Austin Nevin,
Notary Public.

My notary public commission expires Jan. 5th, 1960.

[File indorsement omitted.]

[File endorsement omitted.]

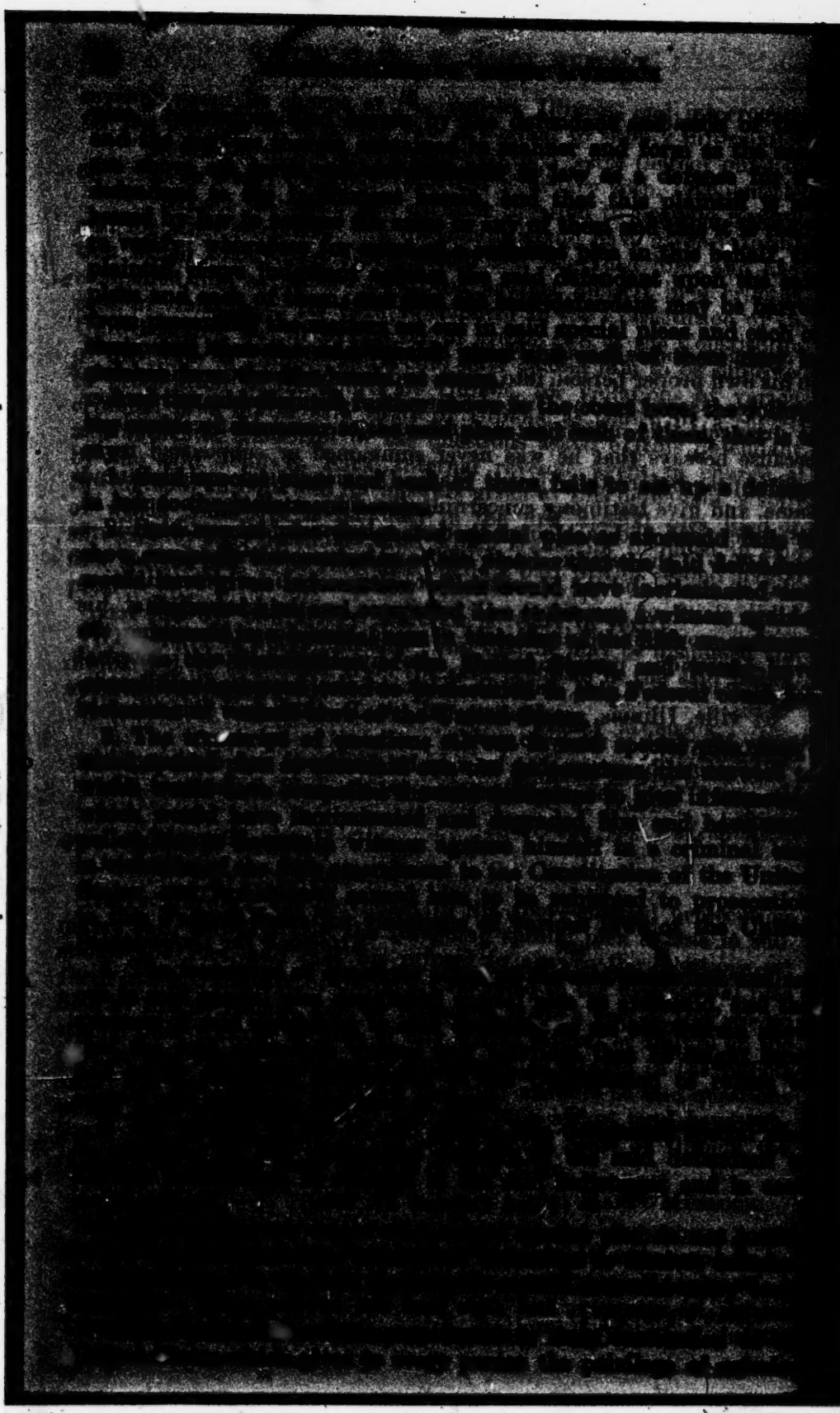
65 [Omitted.]

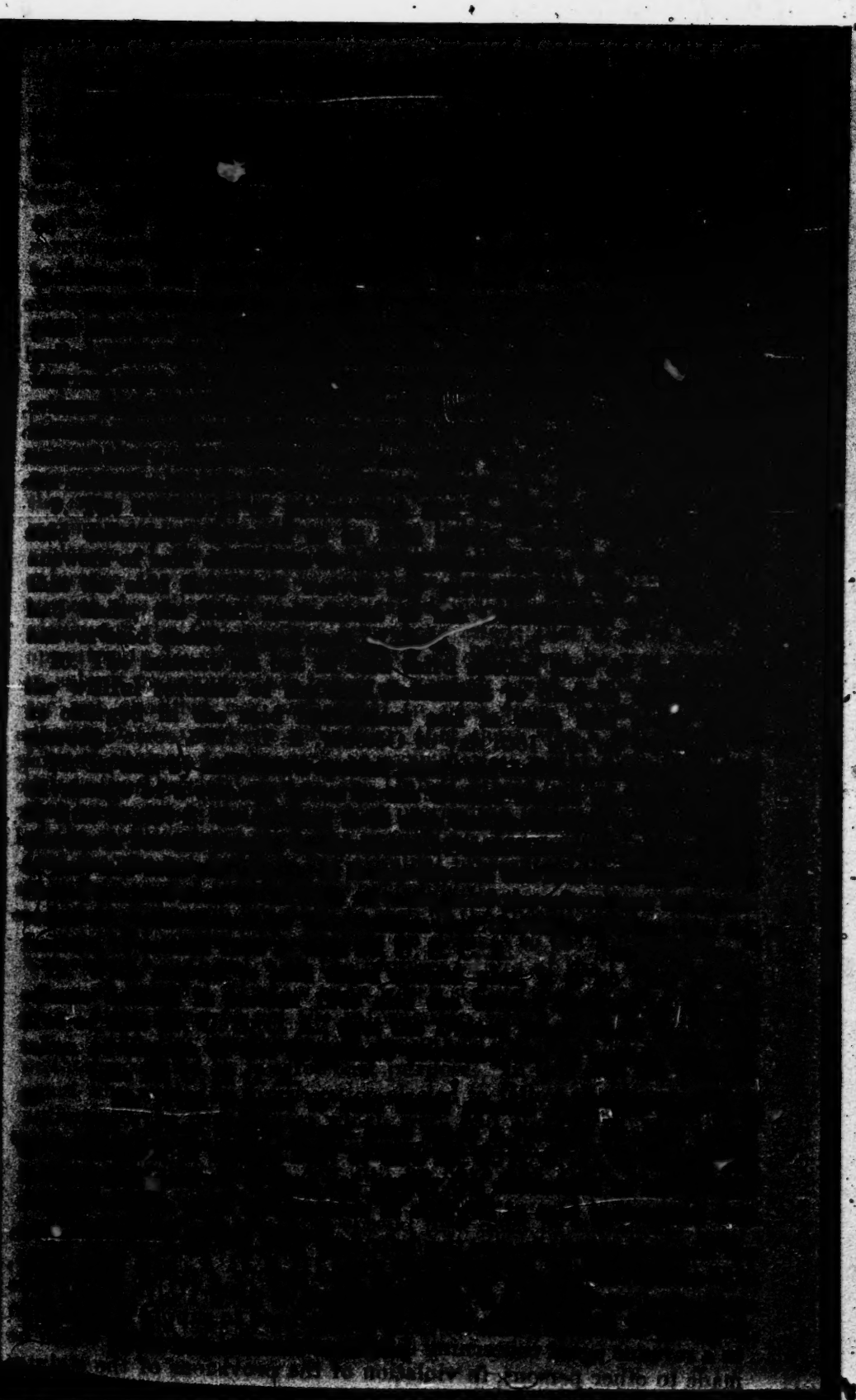
66 In United States District Court

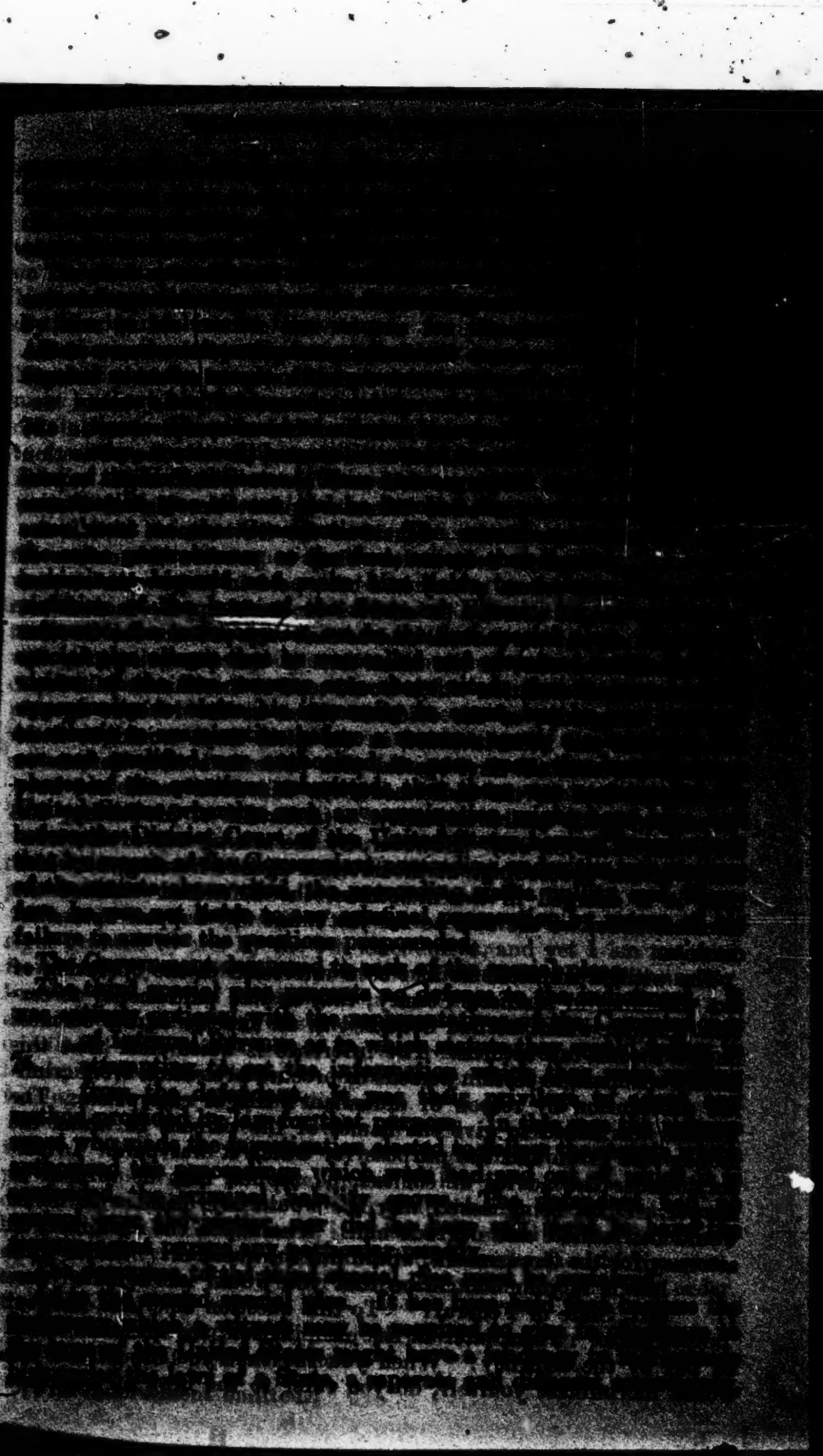
[Title omitted.]

Demurrer to plea

(Filed October 17, 1930)







of the criminal laws of Illinois.

In these circumstances it is argued with a great deal of force that Murdock thereby waived any immunity granted by the 5th amendment to the Federal Constitution by reason of exposing himself to criminal prosecution under the Federal law. The immunity granted to a witness by the 5th amendment can be waived. (Ex parte Irvine, 177 Fed. 883; Thompson v. United States (CCA 7th Cir.), 10 Fed. (2d) 181; Diggs v. United States, 220 Fed. 545, Aff. 242 U. S. 620).

As I said before, the very material question involved in the consideration of the first special plea is whether or not the defendant waived his constitutional right to immunity under the 5th Amendment. A reading of the evidence taken before the referee fairly tends to sustain the conclusion that Murdock was more concerned with protecting other people with whom he had dealings of a criminal nature than he was concerning his own immunity. A clear purpose to shield others is shown. The answer, apparently, was brought out upon defendant's examination by the Government attorney who conducted it. In stating his own reasons, defendant placed no limitations upon the fear of incrimination. When
78 asked why he refused to answer he would say upon the ground that he would incriminate himself; then would follow the technical question which brought the answer which fixed his fear of prosecution to be under the laws of the State.

I am inclined to feel that defendant waived his constitutional right granted to him by the 5th amendment, and yet I am not free from doubt by reason of the particular manner in which the answer limiting his fear of incrimination was procured. The efficacy of the statutes upon which this prosecution is based has been seriously questioned in consideration, for the reason that they contain no immunity provisions broad enough to cover the dangers incident to forcing a witness to a full disclosure.

Considering the fact that I feel warranted in passing the [illegible] which I have on the question as to whether or not the defendant has waived his privilege under the 5th amendment in his favor to the extent of [illegible] the Government's demurrer to the first special plea [illegible] by sustaining the Government's demurrer to the first special plea [illegible] and necessary to prevent an immediate consideration of the [illegible] involved by the United States Supreme Court. The [illegible] therefore will be

Demurrer to first special plea overruled; demurrer to the second and third special pleas sustained.

[Memorandum omitted.]

Judgment, Feb. 3, 1931.

And now on this 3d day of February, A. D. 1931, comes the United States the plaintiff in this case by Walter M. Provine, Esq., United States Attorney for the Southern District of Illinois, and comes also the defendant Harry Murdock, in his own proper person and by H. J. Bandy, Esq., his attorney.

And the said defendant having heretofore entered a plea of not guilty herein, now by leave of court withdraws the same—whereupon the plaintiff stands by its demurrer to defendant's first special plea and the court having heard and duly considered the said matter, here and now renders judgment in favor of the said defendant on his said first special plea, the said defendant to be discharged upon filing recognizance herein in the sum of five thousand dollars.

(Recognizance in amount of $5,000.00. Approved and filed March 16, 1931, omitted in printing.)

(Indorsed:) Filed March 16, 1931. S. T. Burnett, clerk.

[Omitted.]

In United States District Court

[Title omitted.]

Notice of appeal

(Filed Mar. 4, 1931)

To: Harry Murdock, defendant, and Harold J. Bandy, attorney, Granite City, Illinois, and Edmund Burke, attorney, Springfield, Illinois, and each of you:

You will please take notice that the United States of America, plaintiff in the above-entitled cause, feeling aggrieved by the ruling [illegible] in overruling plaintiff's demurrer to [illegible] the court in entering judgment in favor of defendant [illegible] by its demurrer to [illegible] action taken by the United States of America [illegible] a writ of error, [illegible] appeal to the [illegible]

Walter M. Provine,

United States Attorney, in and for the Southern District of Illinois, Attorney for Plaintiff.

[File indorsement omitted.]

84 [Omitted.]

88 In United States District Court

[Title omitted.]

Petition for appeal

(Filed Mar. 4, 1931)

To the honorable Louis Fitzhenry, Judge of said Court:

Now comes your petitioner, United States of America, plaintiff in the above-entitled cause, by Walter M. Provine, United States attorney in and for the Southern District of Illinois, its attorney, and shows to the court that heretofore, on, to wit, February 3, 1931, the District Court of the United States for the Southern District of Illinois, after having theretofore overruled plaintiff's demurrer to the first special plea of the defendant, and also sustained plaintiff's demurrer to the second and third special pleas of the defendant herein, entered judgment in favor of defendant on said first special plea, after the plaintiff had stood by its demurrer to defendant's said special pleas; that said first special plea of the defendant was a plea in bar of this cause of action and of further prosecution of the indictment herein, whereby, and by reason of the entering of said judgment, sustaining the said first special plea in bar, interposed by the said defendant, and your petitioner further shows unto the court that said defendant has not been, by the said indictment or the order of said court, and has not been, in any way put in jeopardy, all of which will more fully appear from the record of this cause in the office of the clerk of this court.

Your petitioner therefore represents that the several pleas by said court, in overruling plaintiff's demurrer to defendant's special pleas, and in entering judgment thereon in favor of defendant on said special plea, and in sustaining plaintiff's demurrer to defendant's first special plea, is error, and is prejudicial to the rights of your petitioner, and that your petitioner intends to prosecute its appeal under law interposed to the damage of your petitioner by reason thereof, as will more fully appear in the written assignment

of errors which is presented and filed herewith, and considered a part hereof.

Wherefore and to the end that said errors may be corrected, your petitioner prays an appeal in said cause from the District Court of the United States for the Southern District of Illinois, Southern Division, to the Supreme Court of the United States, as by law provided; that citation be issued as provided by law, and that a transcript of the record, proceedings and documents, upon which said action was taken by said court, duly authenticated, be sent to the said Supreme Court of the United States, under the rules of said court in such cases made and provided.

Your petitioner further prays that pursuant to statute in such case made and provided, no bond or surety be required of it.

WALTER M. PROVINE,
United States Attorney, for the Southern District of Illinois,
Attorney for United States of America, Plaintiff.

87 [Omitted.]

[File indorsement omitted.]

88 In United States District Court

[Title omitted.]

Assignment of errors

(Filed Mar. 4, 1931)

Now comes United States of America, plaintiff in the above-entitled cause, by Walter M. Provine, United States attorney, in and for the Southern District of Illinois, its attorney, and having heretofore filed its petition for appeal herein, says that in the record and proceedings, and in the action taken by said court, in overruling plaintiff's demurrer to said first special plea, and in entering judgment thereon in favor of defendant on said first special plea, after the plaintiff had stood by its demurrer to defendant's first special plea, there has intervened manifest and prejudicial error, to the prejudice of the plaintiff, United States of America, in the above-entitled cause.

The said errors so intervening are enumerated as follows, to wit:

1. The court erred in overruling plaintiff's demurrer to the first special plea filed by the defendant herein.

2. The court erred in entering judgment in favor of defendant on said first special plea, after the plaintiff had stood by its demurrer to defendant's first special plea.

89 Wherefore, the plaintiff, United States of America, respectfully prays that the action taken by said court, in overruling

plaintiff's demurrer to said first special plea filed by the defendant and the ruling of the court in entering judgment in favor of defendant on said first special plea, after the plaintiff had stood by its demurrer to defendant's first special plea, be set aside, and that the plaintiff's demurrer to defendant's first special plea be sustained, and the judgment heretofore entered by the court in favor of defendant on said first special plea, after the plaintiff had stood by its demurrer to defendant's first special plea, be set aside and held for naught.

WALTER M. PROVINE,
United States Attorney, for the Southern District of Illinois,
Attorney for United States of America, Plaintiff.

[File indorsement omitted.]

90 [Omitted.]

91 In United States District Court

[Title omitted.]

Order allowing Appeal

(Filed Mar. 4, 1931)

Now on this 4th day of March, 1931, there is presented to the court the petition of the plaintiff, United States of America, praying for an appeal herein to the Supreme Court of the United States, and it appearing to the court that there has been filed with said petition for appeal, and assignment of errors, setting forth separately and particularly each error asserted and intended to be urged,

It is therefore ordered by the court that an appeal be, and the same is, hereby allowed said plaintiff, United States of America, as provided by law, to the Supreme Court of the United States, to review the decision, proceedings and the judgment and action taken by the court in this case, wherein the court overruled the plaintiff's demurrer to the first special plea of the defendant, and on February 8, 1931, entered judgment in favor of defendant on said first special plea, after the plaintiff had stood by its demurrer to defendant's first special plea, that citation issue as provided by law; that a full transcript of the proceedings in this case be, by the clerk of this court, presented and filed with the clerk of the Supreme Court of the United States, and that pursuant to statute, in such case made and provided, no supersedeas bond, or cost bond, or surety for the same, need be filed herein by said plaintiff, United States of America.

Dated at Springfield, Illinois, this 4th day of March, 1931.

LOUIS FITZHENRY, *Judge.*

[File indorsement omitted.]

In Circuit Courts Division Court

[Title omitted.]

Praecipe for transcript of record

(Filed Mar. 4, 1931)

To the Clerk of said Court:

Please prepare transcript of record on appeal to the Supreme Court of the United States, in behalf of United States of America same to consist of the following:

1. Placita and captions.
2. Indictment.
3. All demurrers, pleas, motions, judgment of the court, and and all orders of the court in relation thereto.
4. Petition for appeal.
5. Assignment of errors.
6. Order allowing appeal.
7. Citation and service.
8. Praecipe for Transcript of Record.
9. Defendant's bond.
10. Clerk's certificate.

UNITED STATES OF AMERICA,
By WALTER M. PROVIES,
United States Attorney in and for the Southern Dist. of Illinois,
Attorney for Appellant.

Copy of this praecipe for Transcript of Record received this 4th day of March, A. D. 1931.

HARRAD J. BANDY,
EDMUND BURKE,
Attorneys for Defendant Appellee.

[Title of cause omitted.]

[Citation in usual form showing service on Harry Murdock filed Mar. 4, 1931 omitted in printing.]

[Filed Mar. 4, 1931. S. T. Burnett, clerk.]

[Clerk's certificate to foregoing transcript omitted in printing.]

In Supreme Court of the United States

Statement of points relied upon, and designation of entire record for printing

(Filed April 7, 1931)

Pursuant to Rule 13 of this court, appellant specifies the following points upon which it intends to rely in the above-entitled cause:

1. The District Court erred in overruling the Government's demurrer to the appellee's first special plea in bar.

upon the [illegible] by claiming that the payment of the [illegible] answer would not in any way [illegible] laws, or any of them, of the United States, and that the [illegible] would only [illegible] their [illegible] State law.

The appellant deems the above record, as filed, to be necessary for the consideration of the above proposition.

Thomas D. Thacher,
Solicitor General.

Per W. M. K.

Dated August 6, 1931.

[File indorsement omitted.]

(Indorsement on cover:) File No. 36,737. S. Illinois, D. C. U. S. Term No. 515. The United States of America, appellant, vs Henry Murdock. Filed March 24, 1931. File No. 36,737.

JURISDICTIONAL STATEMENT

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 815

UNITED STATES OF AMERICA, APPELLANT

v.

HARRY MURDOCK

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS

STATEMENT OF JURISDICTION

In compliance with Rule 12 of this Court, appellant submits herewith its statement showing the basis of this Court's jurisdiction in the above-entitled cause.

A

STATUTE

The statutory jurisdiction of this Court to review by direct appeal the judgment here complained of is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, sec. 682), otherwise known as the Criminal Appeals Act, and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229,

B

DATE OF JUDGMENT AND APPLICATION FOR APPEAL

The judgment of the District Court was entered February 3, 1931. (R. 78.)[1] The application for appeal was made March 4, 1931, and allowed the same day. (R. 85–86, 91.) The case was docketed in this Court on March 24, 1931.

C

NATURE OF THE CASE

On or about March 15, 1928, and on or about March 15, 1929, the appellee filed his individual Federal income tax returns for the calendar years 1927 and 1928, respectively. (R. 4, 7.) In his 1927 return appellee sought to deduct amounts totalling $12,000, alleged to have been paid out to another person or persons (R. 5, 43), and in his 1928 return he claimed a deduction of $4,000 as salaries which he alleged had been paid out to another person or persons (R. 8, 43).

Under date of December 23, 1929, under the provisions of Sections 1104 and 618 of the Revenue Acts of 1926 and 1928, respectively (c. 27, 44 Stat. 9, 115; c. 852, 45 Stat. 791, 875), the Internal Revenue Agent in Charge at Springfield, Illinois, in pursuance of written authority from the Commis-

[1] All references to the record are to the pages of the printed transcript prepared by the clerk of the District Court and filed with the clerk of this Court. The typed transcript has not been printed.

D

CASES SUPPLEMENTING JURISDICTION

Banning v. Sinclair, 208 U. S. 388, 391-392.

United States v. Barber, 219 U. S. 73, 78.

United States v. Thompson, 251 U. S. 407, 412-413.

United States v. Goldman, 277 U. S. 229, 236-237.

Respectfully submitted.

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APRIL, 1931.

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 38

THE UNITED STATES OF AMERICA, APPELLANT

v.

HARRY MURDOCK

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion of the District Court (R. 34) has not yet been reported.

JURISDICTION

The judgment to be reviewed was entered February 3, 1931. (R. 38.) Appeal to this Court was allowed on March 4, 1931. (R. 41.) The jurisdiction of this Court to review by direct appeal the judgment involved is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, sec. 682) and Section 238 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Does the Fifth Amendment to the Constitution afford a witness in a proceeding authorized by Act of Congress the right to refuse to answer questions which may incriminate him under a state statute?

(2) Where a witness at an investigation authorized by Act of Congress refuses to testify, relying solely upon the contention that such testimony would tend to incriminate him under state law, and is prosecuted for that refusal, may he then rely upon other reasons, not going to the jurisdiction, to justify his refusal to testify at the investigation?

(3) Was the plea of privilege against incrimination under federal law in this case sufficient in the face of specific allegations of fact from which the legal conclusion necessarily follows that there could be no reasonable apprehension of incrimination under federal law?

PROVISIONS OF CONSTITUTION AND OF STATUTES INVOLVED

The Fifth Amendment to the Constitution provides:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

The Revenue Act of 1926 (Act of February 26, 1926, c. 27, 44 Stat. 9) provides by sec. 256, p. 50 (U. S. C. A., Title 26, sec. 1023):

> All persons, in whatever capacity acting, including lessees or mortgagors of real or

personal property, fiduciaries, and employers, making payment to another person, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income * * * shall render a true and accurate return to the commissioner under such regulations and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment. * * *

When necessary to make effective the provisions of this section the name and address of the recipient of income shall be furnished upon demand of the person paying the income. * * *

It provides by sec. 1104, p. 113 (see U. S. C. A., Title 26, sec. 1247):

The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his

testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

And sec. 1114 (a) of the same Act, p. 116, (U. S. C. A., Title 26, sec. 1265) provides:

> Any person required under this Act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

The Revenue Act of 1928 (Act of May 29, 1928, c. 852, 45 Stat. 791) by sec. 148 (p. 836) reenacts sec. 256 of the 1926 Act so far as quoted above. By sec. 618 (p. 878) it amends sec. 1104 of the 1926 Act to read as follows:

> The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service,

designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

Sec. 146 (a) of the 1928 Act (p. 835) follows verbatim the phraseology of sec. 1114 (a) of the 1926 Act except that the word "title" is substituted for "Act" in the two instances in which the latter word is used in the 1926 Act.

STATEMENT

On January 23, 1930 (R. 1), the appellee was indicted in the District Court of the United States for the Southern District of Illinois, under the above-quoted sections 1114 (a) of the Revenue Act of 1926 and 146 (a) of the Revenue Act of 1928, for refusing to give testimony and supply information to an officer of the Bureau of Internal Revenue concerning payments made by him to a person or persons unknown aggregating $12,000 during the year 1927 and the same amount during the year 1928. (R. 2, 3, 4.) The indictment alleged that a duly authorized United States revenue agent had summoned the appellee to give information as to

the names and addresses of the recipients of these moneys for the purpose of assessing and collecting income taxes from them, that the summons had been served on December 27, 1929, and that the appellee had appeared before the agent on January 9, 1930, and had refused to give such information and testimony.

The appellee demurred to the indictment (R. 5, 6) and filed motions (R. 7) which the court denied (R. 12, 13). He pleaded not guilty (R. 13) and subsequently filed three special pleas (R. 15, 29, 31). The first and second of these pleas were pleas of privilege against self-incrimination—the first supported, in form at least, by the allegation that to have furnished the information would have subjected the appellee to prosecution for violations of various laws of the United States, and the second predicated upon a claim of privilege against self-incrimination for violations of state laws. The third plea alleged that the appellee had never been summoned or subpœnaed to appear before the United States District Court for his refusal to testify before the internal revenue agent, and had therefore not been given a day in court and the opportunity to have a judicial determination of his claim of constitutional privilege. (R. 31.) The United States demurred to these special pleas and the demurrers were sustained with respect to the second and third, but overruled with respect to the first plea. (R. 35–37.)

The first plea contains the formal allegation that the information withheld would have caused the appellee to be subjected to prosecution for violations of various laws of the United States, but there is incorporated in this plea a correct and authentic transcript of the proceedings before the internal revenue agent. (R. 15, 16.) The transcript shows that the refusal of the appellee to answer questions as to the identity of the recipients of the payments was at first stated to be upon the ground that such action might incriminate him (R. 22), but that upon further questioning he said that so far as he knew his answers would not incriminate him under any federal laws (R. 22, 23) and that his refusal to answer was based upon the ground that the giving of such testimony might tend to incriminate him under the laws of a State (R. 22, 23, 24, 25, 26, 27, 28; see also 19). This plea, by incorporating the transcript, not only discloses upon its face that the claim of privilege was predicated expressly and exclusively upon the assertion of a privilege against self-incrimination for violations of state law but by setting forth the answers given by the appellee as shown by the transcript further discloses that the claim of privilege against incrimination for violations of federal law, first put forward in the plea itself, was entirely without foundation. From the transcript it appears that the inquiry was directed to the identification of persons unknown to whom payments had been made by the appellee; that the appellee admitted that he had operated approxi-

mately 125 gambling machines in Madison County, Illinois (R. 22); that he was asked whether such machines could be operated without the consent of public officials and he evaded the question by saying merely that it had been done in other places (R. 23), but refused to testify that he was operating such machines without the consent of public officials (R. 23, 24) and refused to say to whom he had made the payments in question upon the ground that to give such testimony might incriminate or degrade him as a violator of state law (R. 24, 25, 26, 27). His claim of privilege, therefore, went solely to the identification of the recipients of these moneys. There is nothing to support the bald allegation that this information could have subjected the appellee to prosecution in a federal court "for violations of various laws of the United States." Thus the allegation is irreconcilable with the allegation in the plea itself of all that occurred before the internal revenue agent, is negatived by the transcript of these proceedings alleged in the plea to be correct and authentic (R. 15), and must be disregarded because it is inconsistent with the facts established by the transcript. In the face of these facts the allegation of danger of federal prosecution is a mere conclusion which is shown to be without foundation.

The court declared that the facts alleged in the plea and admitted by the demurrer showed that if the appellee had answered the questions truthfully he would have furnished testimony which would have tended to incriminate him under the laws of

the United States (R. 36); and that in stating his own reasons for refusing to testify he had placed no limitation upon the fear of incrimination, although his answers had shown that his fear was of prosecution under the laws of the State (R. 37).

The Government thereupon took this appeal.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred—

(1) In overruling plaintiff's demurrer to the first special plea filed by the defendant.

(2) In entering judgment in favor of defendant on said first special plea.

SUMMARY OF ARGUMENT

The gist of the offense charged was refusal to answer questions and supply information required by law at a hearing before an internal revenue agent. For this refusal the appellee did not allege any sufficient excuse. A witness may not refuse to testify in a federal proceeding upon the ground that his testimony might show that he had violated state laws.

The special plea which is here involved alleged that the testimony which had been sought might have incriminated the appellee under federal law, but a transcript of the proceedings before the agent was incorporated in that plea and it shows that the refusal was not due to fear of federal prosecution. In a prosecution for refusing to testify at a hearing, the appellee may not rely upon a broader claim than was made at the hearing.

The information sought at the hearing would not have shown that the witness had violated any federal law.

It follows that the refusal to testify was not within the constitutional privilege asserted and was an offense under the statutes.

ARGUMENT

I

THE WITNESS WAS REQUIRED BY STATUTE TO ANSWER THE QUESTIONS WHICH WERE PUT TO HIM, AND THE SPECIAL PLEA WAS BAD BECAUSE IT FAILED TO ALLEGE ANY SUFFICIENT EXCUSE FOR HIS REFUSAL TO ANSWER

An administrative investigation of the tax returns was an appropriate proceeding. The assessment of taxes is peculiarly an administrative function, and the ascertainment of facts upon which to base such an assessment is with propriety committed to the tax-collecting agencies of the Government. (See *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 42, 43; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 474, 477, 478, 486; 39 Harv. L. Rev. 697, 698.) The internal-revenue agent properly examined the witness in order to find out what person or persons received the twelve thousand dollars expended by the witness in 1927 and again in 1928, so that taxes might be imposed upon such person or persons. The recipients were subject to taxation even though the money had been paid to them for failure to enforce the laws. (*United States* v. *Sullivan*, 274 U. S. 259.)

While the District Court had jurisdiction of process to compel a witness to testify (Act of May 29, 1928, c. 852, sec. 617, 45 Stat. 791, 877; U. S. C. A., Title 26, sec. 2617), any person who willfully failed to supply the information at the time required was also guilty of a misdemeanor (Act of February 26, 1926, c. 27, sec. 1114(a), 44 Stat. 9, 116, U. S. C. A., Title 26, sec. 1265; Act of May 29, 1928, c. 852, sec. 146 (a), 45 Stat. 791, 835, pp. 4, 5, *supra*). The agent was entitled to seek judicial aid to compel the witness to testify, but was not required to do so. Unless excused from testifying by the provisions of the Fifth Amendment, the witness became subject to punishment as soon as he refused to answer.

The questions were designed to disclose the identity of unknown persons who had received taxable income. The inquiries were proper and clearly within the authority of the statute. The witness testified that he had operated approximately 125 gambling machines in the State of Illinois; he refused to tell just where he operated them or whether he had the consent of public officials in carrying on that business; he testified that he so refused because the giving of such information might incriminate him, and that he had in mind the violation of a state law and not the violation of a federal law (R. 22–28); that he did not know of any violation of any federal law (R. 22). As stated by the District Court (R. 37):

> At no time during the examination did he say that he refused to give the names of the

persons to whom the money had been paid on the ground that he would be incriminated under the laws of the United States, but his expressed fear of incrimination was by reason of the criminal laws of Illinois.

To paraphrase the language used by this Court in *Arndstein* v. *McCarthy*, 254 U. S. 71, 72, a witness may well refuse to make further revelations whenever he can fairly claim that to answer the questions may tend to incriminate him under the laws of the United States. The appellee made no such claim at the hearing, although he had had ample notice of the hearing and had legal advice. If he had made such a claim, and it had been "impossible to say from mere consideration of the questions propounded, in the light of the circumstances disclosed, that they could have been answered with entire impunity," it would not have been necessary for him to answer the questions. But the witness apparently never thought, for example, that there was any conspiracy to defraud the United States, and there was nothing in the circumstances disclosed to suggest that such was the case. There was nothing to suggest any reason for refusal to answer the questions other than that the witness had been violating the gambling laws of Illinois and had been paying officials of the State for permission to do so.

A witness is not relieved from answering questions merely because he declares that to do so might incriminate him. (*Mason* v. *United States*, 244 U. S. 362, 366, 367.) The claim of privilege against

self-incrimination must be weighed. In weighing it the explanations given by the witness may be quite material, and in the present case they were conclusive, for the witness modified his broad claim and testified that he did not fear any prosecution under federal law.

It is obvious that the position taken by the witness at the hearing is to be judged by his testimony as a whole and not merely by his initial statement apart from the explanation given to that statement by the witness himself. His contention was that incrimination under state law constituted sufficient excuse for refusing to testify in the federal proceeding, and that was the only excuse which he offered.

This Court has dealt with that contention in cases in which federal statutes granted immunity from further prosecution to witnesses who testified under compulsion, so that questions which might lay the basis for federal prosecution were eliminated, just as, we contend, they are eliminated from the present controversy. In such cases the Court has decided that the Constitution did not relieve a witness before a federal tribunal of the duty of testifying because he might thereby incriminate himself under the laws of a State.

In *Hale* v. *Henkel*, 201 U. S. 43, which involved a refusal to testify before a federal grand jury in an antitrust case, the Court said (pp. 68, 69):

> The further suggestion that the statute offers no immunity from prosecution in the

state courts was also fully considered in *Brown* v. *Walker* (161 U. S. 591) and held to be no answer. The converse of this was also decided in *Jack* v. *Kansas*, 199 U. S. 372, namely, that the fact that an immunity granted to a witness under a state statute would not prevent a prosecution of such witness for a violation of a federal statute, did not invalidate such statute under the Fourteenth Amendment. It was held both by this Court and by the Supreme Court of Kansas that the possibility that information given by the witness might be used under the federal act did not operate as a reason for permitting the witness to refuse to answer, and that a danger so unsubstantial and remote did not impair the legal immunity. Indeed, if the argument were a sound one it might be carried still further and held to apply not only to state prosecutions within the same jurisdiction, but to prosecutions under the criminal laws of other States to which the witness might have subjected himself. The question has been fully considered in England, and the conclusion reached by the courts of that country that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty. *Queen* v. *Boyes*, 1 B. & S. 211; *King of the Two Sicilies* v. *Willcox*, 7 State Trials (N. S.) 1049, 1068; *State* v. *March*, 1 Jones (N. Car.) 526; *State* v. *Thomas*, 98 N. Car. 599.

The English authorities were pertinent in this connection. As pointed out in *Brown* v. *Walker*,

161 U. S. 591, at 597, the rule against compulsory self-incrimination has been firmly embedded in English jurisprudence since about the year 1700.

Of the cases cited in *Hale* v. *Henkel* it is true that in *Brown* v. *Walker*, which dealt with a violation of the Interstate Commerce Act, and in *Queen* v. *Boyes*, the courts said that the danger of prosecution in another jurisdiction was unsubstantial. In *Jack* v. *Kansas* the Court said that the danger of prosecution in a federal court based upon such testimony as was required in the state court was remote, but it added (p. 382):

> We think the legal immunity is in regard to a prosecution in the same jurisdiction, and when that is fully given it is enough.

In *King of the Two Sicilies* v. *Willcox* (1851), 7 State Trials N. S. 1050, the Court of Chancery decided that the English agents of a revolutionary government in Sicily could not refuse to produce documents which might expose their principals or themselves to penalties in a foreign country, the court saying by the Vice Chancellor (1068–1070):

> Can the defendants then object to answer that which might subject themselves to penal consequences if they should go to Sicily? I think not. The rule relied on by the defendants, is one which exists merely by virtue of our own municipal law, and must, I think, have reference, exclusively, to matters penal by that law; to matters as to which, if disclosed, the judge would be able to say, as matter of law, whether it could or could not

entail penal consequences. * * * But, in respect of penal consequences in a foreign country, this can not be. No judge can know, as matter of law, what would or would not be penal in a foreign country; and he can not, therefore, form any judgment as to the force or truth of the objection of a witness, when he declines to answer on such a ground. In the present case, indeed, there will probably be no difficulty in believing that the defendants are speaking quite truly; as the documents may, in all probability, form links in a chain of evidence which might enable the courts in Sicily to convict the defendants of high treason. But, if the principle is once admitted, it must be admitted in all its ramifications. * * * The impossibility of knowing, as matter of law, to what cases the objection, when resting on the danger of incurring penal consequences in a foreign country, may extend, furnishes very strong and, to my mind, satisfactory evidence that the objection can not be sustained. * * *

I am of opinion, for these reasons, in the absence of all authority on the point, that the rule of protection is confined to what may tend to subject a party to penalties by our own laws; and so that the objection in the present case can not be sustained.

State v. *March*, 1 Jones (46 N. C.) 526, was also cited in *Hale* v. *Henkel*. In that case on cross-examination of a witness in order to discredit him he was asked if he had not committed perjury in

Georgia. The Supreme Court of the State said (p. 528):

> But our courts, in administering justice among their suitors, will not notice the criminal laws of another State or country, so far as to protect a witness from being asked whether he had not violated them.

The decision in *Hale* v. *Henkel* was followed in *Elwell* v. *United States*, 275 Fed. 775, 778, where the Circuit Court of Appeals for the Seventh Circuit rejected the claim that a witness was excused from testifying in a federal court by the fact that he might thereby incriminate himself under the laws of Illinois.

The rule laid down in the leading case is discussed at length in Wigmore on Evidence, 2d ed., vol. 4, sec. 2258, with strong approval by that author. See also sec. 2251, pp. 830, 831.

It seems clear that the Court should adhere to the rule that the privilege against self-incrimination guaranteed by the Fifth Amendment does not extend beyond incrimination under federal law.

It is true that in *Brown* v. *Walker* and in *Hale* v. *Henkel*, *supra*, as in *Counselman* v. *Hitchcock*, 142 U. S. 547, the Court was concerned with the scope of immunity statutes and their sufficiency in protecting against future prosecution, thus precluding the claim that testimony concerning the acts involved might incriminate. In *Counselman* v. *Hitchcock* the protection afforded by the immunity statute was held not to be coextensive with the pro-

tection afforded by the Constitution, and the witness was excused from answering. In *Brown* v. *Walker* and in *Hale* v. *Henkel* it was held that as criminality under federal law was removed by the grant of immunity there could be no basis for the assertion of the constitutional privilege, even though the questions called for answers which might incriminate the witness under state law. Thus, the principle upon which these decisions rested clearly is that the constitutional privilege does not protect against self-incrimination under the laws of a sovereignty other than the United States. And that principle, we submit, must control decision in the case at bar.

In *Hale* v. *Henkel* (201 U. S. at p. 69) the Court distinguished *United States* v. *Saline Bank*, 1 Pet. 100, upon the ground that in the earlier case, where it was held that the defendants were not bound to give testimony which would expose them to punishment, the prosecution was under state law and "the federal court was simply administering the state law, and no question arose as to a prosecution under another jurisdiction." In *Ballmann* v. *Fagin*, 200 U. S. 186, decided two months before *Hale* v. *Henkel*, it appeared that the answer might have incriminated under federal as well as under state law, and the Court so pointed out. In *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113, the Court said that as the privilege had been waived it was unnecessary to consider the extent to which the

Fifth Amendment guarantees immunity from self-incrimination under state statutes.

We perceive no logical basis for the application of one rule in measuring the adequacy and scope of an immunity statute as a basis for compelling testimony which discloses acts criminal under state law and the application of a contrary rule where, as in this case, it is apparent that incrimination is confined to offenses under state law.

In *In re Willie*, 25 Fed. Cas. No. 14692e, quoted in *Mason* v. *United States*, 244 U. S. 362, 364, Chief Justice Marshall said:

> When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded.

The rule of the Constitution that no one shall be compelled in any criminal case to be a witness against himself has quite properly been extended beyond its literal meaning, but it is not unlimited in its scope. Thus, a witness may be required to testify against himself if a statute grants him immunity from federal prosecution, even though his testimony may incriminate him under state law (*Hale* v. *Henkel*, *supra*; *Brown* v. *Walker*, *supra*); and an officer (*Wilson* v. *United States*, 221 U. S.

361) or an attorney (*Grant* v. *United States*, 227 U. S. 74) of a corporation may be required to produce its records in court even though the documents may prove that he has violated a federal law. The rule against compulsory self-incrimination, then, is given more than a literal interpretation, but the lengths to which exemption may be extended are limited by the conflicting principle that the Government is entitled to the testimony of every citizen. A government should not be deprived of testimony to which it would otherwise be entitled because of the use which some other government might possibly make of that testimony if it should become available to that other government. It is a sufficient answer to the claim of privilege that the government making the inquiry can not afterwards punish the witness for the offense which he has confessed, and that the inquiry is made in good faith, under authority of law.

II

THE CLAIM OF IMMUNITY AS MADE AT THE HEARING MAY NOT BE ENLARGED AFTER THE HEARING IS CONCLUDED AND THE WITNESS IS UNDER PROSECUTION FOR HAVING REFUSED TO TESTIFY.

The District Court said (R. 36):

> If the transcript of the evidence taken at the revenue agent's hearing had not been included in the plea, there would be little question but that the first special plea presents a clear defense to the offense laid in the

indictment, for Murdock could not have answered with entire impunity.

It is true that without the transcript of evidence the plea would not have shown on its face the existence of facts inconsistent with the rest of the pleadings, and the Government could not have demurred, but would have been obliged to prove at the trial just what occurred at the hearing. The result, however, would not have been different. The contention made in the plea could not have enlarged the claim of immunity as developed at the hearing. The offense denounced by the statute was complete when the witness refused to testify without giving an excuse which was sufficient at law. He did not then offer a sufficient excuse. The circumstances show that there was none. There is nothing to support the suggestion of the District Court that there was a conspiracy to defraud the United States. Certainly the witness knew of no such conspiracy, for he swore that he did not have in mind any violation of federal law. Whether or not there was such conspiracy, his claim of immunity was made under oath at the appropriate time and place and it was insufficient. After the hearing has come to an end that claim may not be enlarged to include matters which might have been included at the hearing, although only if, there had been actual facts which warranted their inclusion.

The privilege guaranteed by the Fifth Amendment may not be asserted unless claimed by [illegible]

fication of a refusal to answer. The appellee was not justified in refusing to answer for fear of prosecution under state law. His refusal was therefore unjustified and punishable under the statute. It follows that the demurrer to the first special plea should have been sustained, and the defendant should have been put to his trial upon the general issue under his plea of not guilty.

III

THE CONCLUSION OF THE DISTRICT COURT THAT THE ANSWERS TO THE QUESTIONS WHICH THE APPELLEE DECLINED TO ANSWER WOULD HAVE TENDED TO INCRIMINATE HIM WAS WITHOUT FOUNDATION

The failure of the appellee to claim that his answers might incriminate him under federal law was not inadvertent. His statements and those of his attorney made in his presence and in his behalf before the internal revenue agent disclose that there was not only no claim of the possibility of incrimination under federal law but that there was no possible basis for such a claim with respect to the questions which the appellee refused to answer. These questions related to the appellee's operation of gambling devices and the identification of a person or persons unknown to whom the appellee paid $24,000 over a period of two years. The operation of gambling machines and the payments to unknown persons in connection with that business were not offenses against the laws of the United

[illegible] and at the time the appellee made [illegible] of immunity he frankly stated that he did not know how his answers could incriminate him under any federal statute.

Thus, decision is controlled not merely by the appellee's failure to claim incrimination under federal law, but upon a showing affirmatively made and incorporated in the special plea that there was no possible basis for any such claim. The decision of this Court in *Mason* v. *United States*, 244 U. S. 362, shows that appellee's claim of privilege is entirely without support because there was no reason to apprehend danger of prosecution under any federal statute resulting from the disclosure of the appellee's participation in gambling operations and payments of money in connection with the conduct of that business. His fear was of prosecution under state law; and there was no apprehension of prosecution under any other law.

The formal allegation in the special plea that the information withheld would have caused the appellee to be subjected to prosecution for violations of various laws of the United States is of no importance because the plea incorporates a correct and authentic transcript of the questions asked and answers given before the revenue agent. Since this transcript discloses that no claim was made of incrimination under federal law, and, further, that any such claim would have been utterly without foundation, the formal allegation to the contrary

must be disregarded because the specific facts alleged are in complete negation of this unsupported conclusion. The District Court ignored the allegation of specific facts and accepted a legally inconsistent conclusion as admitted. Thus, the controlling facts which were admitted by the pleadings were ignored and decision was rested upon a complete negation of controlling and established fact.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

ROBERT P. REEDER,
Attorney.

OCTOBER, 1931.

U. S. GOVERNMENT PRINTING OFFICE

OCTOBER TERM, 1931.

THE UNITED STATES OF AMERICA, Appellant,

v.

HARRY MURDOCK, Appellee.

On Appeal from the District Court of the United States for the Southern District of Illinois.

BRIEF FOR APPELLEE.

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Springfield, Ill.,
Attorney for Appellee.

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No. 38.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

THE UNITED STATES OF AMERICA, Appellant,

v.

HARRY MURDOCK, Appellee.

On Appeal from the District Court of the United States for the Southern District of Illinois.

BRIEF FOR APPELLEE.

STATEMENT.

Section 1104 of the Internal Revenue Act of 1926 (see U. S. C. A., Title 26, Section 1247), provides:

"The commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employe of such person,

of the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

With very little change in language this section of the Act of 1926 was re-enacted into the Revenue Act of 1928, and appears as section 618 thereof.

Section 1114 (a) of the Act of 1926 (U. S. C. A., Title 26, Sec. 1265) provides:

"Any person required under this act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment or collection of any tax imposed by this act, who willfully fails to pay such tax, make such return, keep such records or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of the prosecution."

Section 1114 (a) of the Act of 1926 was re-enacted into the Revenue Act of 1928 as section 146 (a) thereof.

On December 27, 1929, a written summons was served upon appellee requiring him to appear on December 30, 1929, before John R. Kirk, United States Internal Reve-

nue Agent in charge at Springfield, Ill., to give testimony and supply information for and to said internal revenue agent concerning the payment of $12,000 listed as a deduction from the taxable income of appellee in his return for the calendar year 1927, and concerning the names and addresses of the recipients of such payment, for the purpose of the computation, assessment and collection of income taxes imposed upon and due to the United States from such other person or persons. The summons also required appellee to appear and supply information to the same effect concerning a deduction from his income made by him in his return for the calendar year 1928.

In obedience to this summons appellee appeared before said internal revenue agent on July 9, 1930. He was placed under oath and interrogated by the internal revenue agent and an attorney representing the Internal Revenue Department.

He refused to answer certain questions on the ground that his answers "might give information that might incriminate and degrade" him (Rec., pp. 22, 23, 24, 26, 27, 28).

Thereafter, on January 23, 1930, appellee was indicted in the District Court of the United States for the Southern District of Illinois and was charged in the first count with a violation of Section 1114 (a) of the Revenue Act of 1926, and in the second count with a violation of Section 146 (a) of the Revenue Act of 1928. The essence of the offense charged in each count was the unlawful refusal of appellee

to supply information required by law at a hearing before an internal revenue agent.

Prior to being indicted the appellee was not required to appear and testify in any district court of the United States. He was not accorded an opportunity to assert his claim of constitutional privilege from giving information that might incriminate him by appealing to a court for protection of his privilege of refusing to give testimony of a self-incriminating nature as guaranteed by the Fifth Amendment to the Constitution of the United States. He was denied an opportunity to have his claim of privilege judicially determined in spite of the fact that Section 1122 (a) of the Internal Revenue Act of 1926 and Section 617 (a) of the Act of 1928 each provided as follows:

> "If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers or other data, the District Court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony or production of books, papers or other data."

Section 1122 (b) of the Act of 1926, as re-enacted into the Act of 1928 as Section 617 (b), provided:

> "The district courts of the United States, at the instance of the United States, are hereby invested with such jurisdiction to make and issue, both in actions at law and suits in equity, writs and orders of injunction, and of ne exeat republica, orders appointing receivers,

and such other orders and processes, and to render such judgments and decrees, granting in proper cases both legal and equitable relief together, as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws."

The appellee filed a demurrer to the indictment, which the Court overruled. He then filed several motions which were also overruled. He then filed three sworn special pleas. The Government interposed a demurrer to each of these pleas (Rec., p. 31). The Court sustained the demurrer to the second and third pleas, but overruled it as to the first one, and entered judgment in favor of appellee on said first special plea (Rec., pp. 37, 38). From this judgment the Government appealed to the Supreme Court of the United States.

Appellee's first special plea (Rec., p. 15), upon which judgment was entered in his favor, averred that the United States ought not further to prosecute this indictment against him because if he had answered the questions that were asked of him at said hearing he would have given information that would have incriminated and degraded him and have compelled him to become a witness against himself in a criminal case, in violation of the Fifth Amendment to the Constitution of the United States, and would have caused him to be subjected to prosecution in

this federal court for violation of various laws of the United States. In support of this averment he incorporated in the plea a stenographic transcript of the proceedings before Internal Revenue Agent Kirk, and made it a part thereof.

Appellant's statement of the contents of this plea is incorrect, in that it fails to disclose the following substance thereof: That if appellee had answered the questions put to him by the Internal Revenue agent in charge he would have given information which would have incriminated and degraded him, compelled him to become a witness against himself in a criminal case, in violation of the Fifth Amendment to the Constitution of the United States, and would have caused him to be subjected to prosecution in the federal court for violation of various laws of the United States, as shown by the transcript of the proceedings before the Internal Revenue agent in charge, which are set out in full in the plea (Rec., p. 15).

It appears from this transcript (Rec., p. 16 et seq.) that appellee had shown in his income tax return for each of the years 1927 and 1928, respectively, the sum of $12,000 deductible expense, the same having been paid to another person or persons; that at this hearing he waived his claim to these deductions and objected to any further examination (Rec., p. 18). It further appears that the right and authority of the agent to require appellee to specify under what law his answers would incriminate him was protested (Rec., p. 22), and that the agent, while

conceding that the question would have to be settled at some other place than this hearing (Rec., p. 19), insisted that the transcript show whether appellee's counsel, in advising him, had in mind incrimination under state law or federal law, whereupon counsel stated: "I think I would state that we have particularly in mind a state law." It further appears that of the large number of questions propounded to appellee there were fourteen which he refused to answer, specifically stating in each instance that his refusal was upon the ground that he might incriminate himself. It further appears that in eleven of these instances, after appellee had asserted his constitutional privilege without qualification or limitation, the agent succeeded in getting into the transcript his own statement that appellee had in mind incrimination under a state law and in procuring appellee's monosyllabic acquiescence thereto.

The following statement on page 7 of appellant's brief is untrue: "The transcript shows that the refusal of the appellee to answer questions as to the identity of the recipients of the payments was at first stated to be upon the ground that such action might incriminate him (Rec., p. 22), but that upon further questioning he said that, so far as he knew his answers would not incriminate him under any federal laws (Rec., pp. 22-23), and that his refusal to answer was based upon the ground that the giving of such testimony might tend to incriminate him under the laws of the state (Rec., pp. 22, 23, etc.)." Reference to these

pages of the record and an examination of the whole transcript will show that appellee made no statement even slightly resembling that here attributed to him. Upon being asked (Rec., p. 22) what was his business, whether he had ever been in any other business and whether he had in mind a federal law in refusing to answer those two questions, his response was, "Not that I know of." Before appellant is permitted to present any argument to this Court we feel that it should be called upon to explain the circumstances which caused such a misleading, untrue and prejudicial statement to be included in their brief. Assuming as we do that it was unintentional, we feel that the appellant should be called upon by the Court to retract it.

The United States District Court, in its opinion given at the time of overruling the Government's demurrer to the first special plea (Rec., p. 37), clearly shows that that Court believed that appellee's refusal to answer questions upon the ground that his answers might incriminate him was inclusive and was not limited to a fear of prosecution only under state laws. The District Court said:

> "In stating his own reasons defendant placed no limitations upon the fear of incrimination. When asked why he refused to answer he would say upon the ground that he would incriminate himself; then would follow the technical question which brought the answer which fixed his fear of prosecution to be under the laws of the state."

The Internal Revenue Acts of 1926 and 1928 did not grant immunity to witnesses who testified under compulsion. As stated by the District Court (Rec., p. 37):

> "The efficacy of the statutes upon which this prosecution is based has been seriously questioned in administration, for the reason that they contain no immunity provisions broad enough to cover the dangers incident to forcing a taxpayer to a full disclosure."

SUMMARY OF ARGUMENT.

The appellee refused to answer some of the questions that were propounded to him, because his answers would furnish the Government with information that could be made the basis of prosecutions against him for violation of various federal laws. He had no protection from being subjected to criminal prosecutions in a federal court predicated upon information he would have given in reply to the questions he refused to answer, because the Internal Revenue Acts of 1926 and 1928 did not grant immunity from criminal prosecution that would be based upon enforced testimony wrung from the witness. Appellee's claim of privilege, made to the internal revenue agent, was complete, and was not limited to a fear of prosecution for violation of a state law.

The appellee committed no offense in refusing to answer questions propounded to him by the internal revenue agent. No judicial power was vested in the internal revenue agent, and the agent was without right or power to pass upon appellee's claim of constitutional privilege. Appellee should have been summoned into the United States District Court, placed under oath, and interrogated in order that he could assert his claim of constitutional privilege and have a judicial determination of his claim. This procedure was required by Sections 1122 (a) and (b) of the Internal Revenue Act of 1926 and Sections 617 (a) and

(b) of the Act of 1928. Until this procedure was followed he was not properly subject to indictment and prosecution. Requiring his appearance in the United States District Court, and interrogating him there under oath, were conditions precedent to an indictment. If this procedure had been followed, and the Court had found that his claim of privilege was frivolous and without merit, and if he had then persisted in his refusal to answer, he could have been punished for contempt of court, and he could also have been indicted and prosecuted for violation of Section 1114 (a) of the Revenue Act of 1926 and Section 146 (a) of the Act of 1928.

The appellant is precluded from contending at this time that the claim of constitutional privilege from answering was without merit or untrue. The effect of the demurrer to this verified special plea was to admit the truth of its averments. The principal allegation contained in that plea was that if appellee had answered the questions propounded to him he would have given information which would have incriminated and degraded him, and have compelled him to become a witness against himself in a criminal case in violation of the Fifth Amendment to the Constitution of the United States and have caused him to be subjected to prosecution in a federal court for violations of various laws of the United States. The only way in which appellant could have attacked this verified claim by appellee was by traversing the allegation by filing a replication to it, and thereby submitting an issue of fact to the Court. By

demurring to the plea, and thereby admitting its truth, appellant left no other course open to the District Court than to overrule the demurrer and, upon appellant electing to stand by its demurrer, to enter judgment for appellee upon the plea.

The transcript incorporated in and made a part of the first special plea clearly shows that if appellee had answered some of the questions he refused to answer he would have been subjected to prosecution in a federal court for violation of various federal laws. If his answers had disclosed that his deductions of $12,000.00 from his taxable income for the calendar year 1927, and also for the calendar year 1928, as shown by his returns for those years, were not authorized by law, but were made in order to reduce the amount of his income tax, and to defraud the Government, he could have been subjected to prosecution under certain of the penal sections of the Income Tax Law. If his answers had shown that his refusal to designate the names of the recipients of these sums of money was for the purpose of protecting them from the payment of income tax which they should have paid to the Government, he could have been indicted and prosecuted, jointly with them, for the crime of conspiring to commit an offense against the United States.

ARGUMENT.

The Fifth Amendment to the Constitution of the United States provides that no person "shall be compelled, in any criminal case, to be a witness against himself."

Appellee was summoned to appear before an internal revenue agent. When he responded to the summons he was placed under oath and asked questions which he refused to answer, on the ground that his answers might incriminate and degrade him. The Internal Revenue Acts of 1926 and 1928, by the authority of which the internal revenue agent undertook to interrogate appellee, granted no immunity to witnesses who testified under compulsion as the internal revenue agent attempted to make appellee do.

The case of Counselman v. Hitchcock, 142 U. S. 547, presented a question almost identical with the one which is presented in this case. Counselman was subpoenaed before the grand jury in the Circuit Court of the United States for the Northern District of Illinois and was interrogated concerning rebates received by him as a shipper of grain over various railroads. The questions were propounded for the purpose of eliciting information from him of violations by the railroad companies and Counselman of certain sections of the Interstate Commerce Act of February 4, 1887. The Interstate Commerce Act did not confer immunity from further prosecution upon the witness, but there was in force at that time a general immunity

statute which was referred to in the Court's opinion as Section 860 of the Revised Statutes. This general immunity statute has since been repealed, and there is now no such law in force. Upon refusing to answer the questions of the grand jury upon the ground that his answers would incriminate him, Counselman was cited before the Court, interrogated there, and ordered to answer. Again appearing before the grand jury and refusing to answer, he was cited and punished for contempt of court. On a hearing of his petition for a writ of habeas corpus the Circuit Court of Appeals ordered him remanded to jail. The Supreme Court of the United States, in the case above cited, reversed the Court of Appeals and held that the general immunity statute referred to did not have the effect of protecting Counselman from further prosecution because, as stated by the Supreme Court:

> "It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."

The Court said, further:

> "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution

after he answers the incriminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

It was held in Counselman v. Hitchcock, supra, that the witness was privileged from answering questions which might incriminate him because the Interstate Commerce Act did not contain an immunity section. Following this decision Congress added an amendment to the Interstate Commerce Act which conferred complete immunity from prosecution of any witness that would be based upon testimony elicited from such witness. Then followed the case of Brown v. Walker, 161 U. S. 591. Brown was subpoenaed before the grand jury and questioned concerning rebates given by the Allegheny Valley Railway Company in violation of certain provisions of the Interstate Commerce Act. He refused to answer. The Court ordered him to answer. He again refused, whereupon he was adjudged in contempt and punished. He petitioned the Circuit Court for a writ of habeas corpus. His petition was dismissed, and the judgment was affirmed by the Supreme Court of the United States upon the sole ground

that the amendment of the Interstate Commerce Act conferred complete immunity upon him, and completely protected him from any danger of prosecution in a federal court that would be based upon any information obtained from his testimony. The language of the Court in this case clearly shows that if the immunity amendment had not been added to the Interstate Commerce Act Brown could not have been compelled to testify and could not have been punished for refusing to give answers that might have incriminated him.

The transcript of the proceedings in this case before the internal revenue agent clearly shows that appellee's claim that his answers to certain questions might subject him to criminal prosecution was not chimerical. The record shows that his fear was well founded. The internal revenue agent attempted, throughout the proceeding, to extract information from him showing that he had paid certain persons protection money in order that he might operate gambling machines in violation of law. If the money was paid for this unlawful purpose he had no right to deduct the amounts of those payments from his taxable income, and if the information obtained from his testimony disclosed that he had made improper and unwarranted deductions from his taxable income and had thereby defrauded the Government of tax that he should have paid, he would have been subjected to prosecution in a federal court for violation of certain penal sections of the Internal Revenue Act. Moreover, inasmuch as he

swore to his income tax returns, he could have been prosecuted in a federal court for perjury. In addition to this, if the testimony had shown that he acted in concert with the recipients of the money to conceal their identity in order that they might be saved from paying income tax, he could have been indicted and prosecuted jointly with them for conspiracy.

It is clear that his answers, if they had been the kind of answers the internal revenue agent expected to receive, would have subjected him to prosecution, and, because of the omission from the Internal Revenue Acts of 1926 and 1928 of an immunity provision, he would have had no defense to such a prosecution. His fear of federal prosecution was not imaginary. His refusal to answer was based upon solid fact, and he was protected in that refusal by the Fifth Amendment to the Constitution of the United States. He was the judge of whether his answers might tend to incriminate him. The fair inference to be arrived at from the language of the Supreme Court in Ballmann v. Fagin, 200 U. S. 186, is that the courts should sustain the witness' claim of privilege, unless it is clear that the evidence obtainable from his testimony could not by any possibility incriminate him.

In the case of Internal Revenue Agent v. Sullivan, 287 Fed. 138, the Court said:

> "At the outset it may be stated that the law is well settled that the constitutional provision against com-

pelling a person to be a witness against himself or self-incrimination applies with equal force to oral testimony and to the production and examination of one's books and papers (Boyd v. U. S., 116 U. S. 616). Indeed, in Counselman v. Hitchcock, 142 U. S. 547, the Supreme Court substantially stated that this rule of personal guaranty and protection was not limited to a criminal prosecution; that it applied to a witness in an investigation, and if the testimony tended to show that he himself had committed a crime he could refuse to testify unless immunity against prosecution for the offense was provided by statute. In Lewisohn v. O'Brien, 176 N. Y. 253, the Court of Appeals of this state, in effect, held that a witness was privileged from testifying if it appeared that the question was of such a nature that it could be fairly perceived that an answer thereto might incriminate him; that it rested with himself to answer the question or not; and further that, if in such a case the witness states upon oath that his answer would criminate him, no testimony can be required of the fact."

Careful reading of the transcript of evidence incorporated in the first special plea shows there was nothing contained in appellee's refusal to answer questions that indicated bad faith, or that his fear of being subjected to criminal prosecution was not well founded.

The indictment of appellee was premature. He was not guilty of refusing to supply information as alleged in the indictment even if his answers would not have incriminated him. His claim of constitutional privilege asserted

before the internal revenue agent was futile and of no avail because the internal revenue agent was vested with no judicial power and could not pass upon his claim of privilege. He could not have been adjudged guilty of refusing to supply information and of violating the sections of the internal revenue law upon which this indictment is predicated until he had first been summoned and required to appear and be interrogated in the District Court as provided for by Sections 1122 (a) and (b) of the Internal Revenue Act of 1926 and Sections 617 (a) and (b) of the Act of 1928, and until there had been a judicial determination of his claim of constitutional privilege and the Court had decided the question adversely to him and commanded him to answer the questions. Section 1114 (a) of the Revenue Act of 1926 and Section 146 (a) of the Revenue Act of 1928, upon which this indictment is based are not complete in themselves. Although providing that persons who willfully fail to supply information shall be punished, these sections do not set forth the procedure that the Internal Revenue Department must take in order to obtain the information. Section 1114 (a) of the Act of 1926 must be read together with Section 1122 (a) of that Act and Section 146 (a) of the Act of 1928 must be read with section 617 (a) of that act. Section 1122 (a) of the Act of 1926 and Section 617 (a) of the Act of 1928 provide that:

> "If any person is summoned under this act to appear to testify or to produce books, papers, or other

data, the District Court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers or other data."

The reason for the inclusion of these sections in the two acts is that an internal revenue agent cannot determine a witness' claim of constitutional privilege from answering questions. This claim can be settled only in a court of competent jurisdiction.

There is no merit to appellant's contention that appellee limited his claim of privilege from answering to a danger of being prosecuted in a state court for violation of a state law. He could only assert his claim in a court of competent jurisdiction. Section 1122 (a) of the Act of 1926 and Section 617 (a) of the Act of 1928 provided the proper and only procedure to be followed. It required the Internal Revenue Department to summon appellee into the District Court, where his refusal to answer could be judicially decided. Because the Internal Revenue Department failed to follow this necessary procedure, appellee was given no opportunity to make any protecting claim of constitutional privilege until after he had been indicted. This he did when he filed his first verified special plea. Then, for the first time, and at the first opportunity, he stated under oath, in court, that he could not answer certain questions that were propounded to him by the in-

ternal revenue agent because his answers "would have given information which would have incriminated and degraded him, and have compelled him to become a witness against himself in a criminal case, in violation of the Fifth Amendment to the Constitution of the United States and would have caused him to be subjected to prosecution in this federal court for violations of various laws of the United States" (Rec., p. 15).

The truth of appellee's claim, as sworn to by him in his first special plea, is admitted by appellant's demurrer. The demurrer could have had no other effect, and his sworn statement that his answers would have caused him to incriminate himself and have subjected himself to criminal prosecution in a federal court must be taken as true.

There is no merit to the contention of counsel for appellant that appellee limited his claim of privilege to a fear of being prosecuted in a state court. Examination of the transcript of his testimony will show that in each instance when he refused to answer a question he covered the complete field of federal and state law and did not in any instance limit the grounds of his refusal. In each instance, following his refusal upon broad, unlimited grounds, the attorney representing the Internal Revenue Department pried from him an answer to the effect that he had in mind a state law. For example, the following is shown on page 22 of the record:

"A. I refuse to answer.
Q. On what ground?

A. On the ground that I might give information that might incriminate and degrade myself.

Q. Do you have in mind the violation of a federal law or state law when you state your ground is that you might give information to incriminate or degrade yourself?

A. Against a state law.

Q. And not against a federal law? Is that right, Mr. Murdock?

A. Not that I know of."

Thereafter, as shown at the top of page 26 of the record, after refusing to answer on the broad ground that his answer might incriminate and degrade him, counsel representing the Internal Revenue Department prodded him with this question:

"Q. And in stating that your ground for refusal to answer is that you might incriminate or degrade yourself, you have in mind the violation of a state law and not the violation of a federal law? Is that right?"

To this question appellee invariably responded, "Yes, sir."

It is thus seen that appellee placed no limitation upon his refusal to answer questions that might incriminate him. Whatever limitation seems to appear in his answers was placed in his mouth by, and was the idea of, the attorney representing the Internal Revenue Department, and was not at any time the thought of appellee. As stated by the District Court in the opinion rendered when overruling appellant's demurrer to the first special plea (Rec., p. 37):

"In stating his own reasons, defendant placed no limitations upon the fear of incrimination. When asked why he refused to answer he would say upon the ground that he would incriminate himself; then would follow the technical question which brought the answer which fixed his fear of prosecution to be under the laws of the state."

The statement on page 13 of appellant's brief that appellee "testified that he did not fear any prosecution under federal law" is not borne out by the record.

Inasmuch as the transcript of the testimony before the Internal Revenue Agent, as it appears in the record, clearly shows that appellee's refusal to answer certain questions was based upon a well-founded fear of self incrimination and subjection to criminal prosecution in a federal court, and because appellee has stated under oath in his first special plea that answers to those questions would have subjected him to such prosecution and his claim of privilege has not been traversed or challenged by appellant by sworn replication or other proof, we respectfully submit that appellee was entitled to the protection of the Fifth Amendment to the Constitution of the United States, and that the action of the District Court in overruling appellant's demurrer to the first special plea and rendering judgment for appellee upon that plea when appellant elected to stand by its demurrer was proper, and that the judgment should be affirmed.

Respectfully submitted,

EDMUND BURKE,
Attorney for Appellee.

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CHARLES LOUIS CR

No. 38.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

THE UNITED STATES OF AMERICA, Appellant,

vs.

HARRY MURDOCK, Appellee.

On Appeal from the District Court of the United States for the Southern District of Illinois.

APPELLEE'S PETITION FOR REHEARING.

EDMUND BURKE,
Springfield, Ill.,
HAROLD J. BANDY,
Granite City, Ill.,
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St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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No. 38.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

THE UNITED STATES OF AMERICA, Appellant,

vs.

HARRY MURDOCK, Appellee.

On Appeal from the District Court of the United States for the Southern District of Illinois.

APPELLEE'S PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

Fully appreciating the impropriety of burdening this Honorable Court with a petition that is based upon frivolous grounds or filed only to accomplish delay, but with the firm conviction that an important question involving the constitutional rights of appellee is here involved that justifies resubmission and further consideration of this case, we humbly and earnestly present this petition for a rehearing.

The substance of the pertinent facts in this case are concisely stated in the first paragraph of your opinion, in which your Honors say:

> "Appellee filed his individual federal income tax returns for 1927 and 1928, and in each year deducted twelve thousand dollars ($12,000.00) which he claimed to have paid to others. An authorized revenue agent summoned appellee to appear before him and disclose the recipients. Appellee appeared, but refused to give the information on the ground that to do so might incriminate and degrade him."

The record shows that each time he refused to answer a question he said: "I might give information that might incriminate and (or) degrade myself."

We respectfully submit that the question presented by the refusal of appellee to answer differs materially from the situation disclosed in the Sinclair case (Sinclair v. United States, 279 U. S. 263, 73 Law. Ed. 692). Mr. Sinclair refused to answer a question propounded to him by Senator Walsh, a member of the committee on public lands and surveys of the United States Senate, on the ground that the committee had exhausted its power, and that the particular subject under investigation was at that time pending in legal actions and was a judicial question, which was determinable only in the courts. Your opinion in that case states that "he disclaimed any purpose to invoke protection against self-incrimination and asserted there was nothing in the transaction which could incriminate him," and that he said: "I shall reserve any evidence I may be

able to give for those courts to which you and your colleagues have deliberately referred all questions of which you had any jurisdiction, and shall respectfully decline to answer any questions propounded by your committee." This was a deliberate, intentional refusal to answer. He did not base his refusal upon any right conferred by the Fifth Amendment or any other section of the Federal Constitution. Your opinion in that case says that "the refusal to answer was deliberate."

We respectfully submit that appellee's refusal to answer certain questions was not deliberate. His conduct evinced no intention to hold in contempt the investigation being conducted by the federal revenue agent, or to remain silent for arbitrary reasons not supported by law. His excuse for not answering certain questions plainly shows that he feared his answers would incriminate him. When questions were asked that did not call for incriminating replies he answered promptly and frankly. It was only when the questioner submitted queries requiring answers containing the nucleus of a criminal prosecution of him that he asserted the privilege of silence on the ground that his answers would incriminate him.

He did not say that he refused to answer because his answers might subject him to criminal prosecution in a state court for violation of a state law. We respectfully submit that he did not in any instance voluntarily limit his claim of privilege to a fear of criminal prosecution in a state court. His answers were invariably broad enough

to cover prosecutions in federal courts for violations of federal laws, and broad enough to invoke the protection of the Fifth Amendment to the Constitution of the United States.

Although it is true, as stated in the opinion filed in this case, that "the privilege of silence is solely for the benefit of the witness and is deemed waived unless invoked," we respectfully submit that the record in this case plainly shows that appellee had no intention whatever of waiving his privilege; that he tried to bring himself within the protection of the Fifth Amendment to the Federal Constitution; that whatever he said that might be construed as a waiver of the protection of the Fifth Amendment to the Federal Constitution was the thought of the attorney for the Internal Revenue Department, was placed in the mouth of appellee by that person and was not at any time the thought of appellee.

The record shows that in almost every instance, after appellee refused to answer a question on the ground that the answer might incriminate or degrade him, the attorney representing the Internal Revenue Department said: "And in stating you refuse to answer that you might incriminate or degrade yourself you have in mind the violation of a state law and not a federal law."

We respectfully submit that his answers could not have subjected him to state prosecution, but they would undoubtedly have imperiled him in the federal jurisdiction.

It is hardly reasonable that appellee was thinking about

state laws or state court prosecutions. There was nothing connected with the investigation that could direct his attention to a danger of prosecution for violation of a state law. As stated by your Honors in the opinion filed in this case:

> "Nothing of state concern was involved. The investigation was under federal law in respect of federal matters. The information sought was appropriate to enable the burdeau to ascertain whether appellee had, in fact, made deductible payments in each year as stated in his return and also to determine the tax liability of the recipients."

The record shows that at the hearing appellee accounted specifically for all of the twenty-four thousand dollars ($24,000.00) of deductions shown in his returns excepting eleven thousand nine hundred ninety-nine dollars and ninety-five cents ($11,999.95). Near the end of the examination the attorney who represented the Federal Revenue Department asked appellee this blanket question (Rec., p. 27): "As to the balance, which is approximately eleven thousand nine hundred and ninety-nine dollars and ninety-five cents ($11,999.95), you wish to go on record as refusing to state the names of the persons or recipients of that money or amounts paid such persons?" To this appellee replied: "Yes, sir." The questioner then asked: "And you refuse to answer on the ground that such answer may tend to incriminate or degrade you?" To this he replied: "Yes."

This question covered the entire examination. Appellee's answer constituted a clear claim to the protection of the Fifth Amendment to the Constitution.

We respectfully submit that to hold that appellee did not claim the privilege of silence because of a fear of criminal prosecution in a federal court; that he, in fact, expressly waived the protection of the Federal Constitution at a hearing involving only questions of federal concern and that could result in a criminal prosecution only in a federal court, is to hold that he waived the very privilege which he was earnestly attempting to assert. With the utmost deference, we humbly submit that to construe his conduct as a waiver of his right to protection under the Fifth Amendment of the Federal Constitution is to deny him the protection which, in the lumbering and inept manner of a layman, he was attempting to claim. We further respectfully submit that such a holding places too narrow a construction upon what appellee said and did, and, in this respect, is not in accord with what this Honorable Court has uniformly said to the effect that the constitutional rights of the citizen should be liberally construed in order to effect the purposes they were intended to serve. This Honorable Court said, in Boyd v. United States, 116 U. S. 616, that:

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security

of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon."

We respectfully call attention to the fact that the manner in which appellee was induced by counsel representing the Internal Revenue Department to agree that his answers would incriminate him only in a state court, is very remindful of entrapment. The conduct of the examination of appellee was not in accord with the sprit of the Fifth Amendment, as construed by this Honorable Court. The examination as conducted constituted a game that had for its purpose the destruction of appellee's constitutional right, under the Fifth Amendment, to refuse to answer incriminating questions. In each instance, after appellee asserted the privilege of silence, after he plainly claimed his right as guaranteed by the Fifth Amendment to refuse to give information that might tend to incriminate him, his questioner adroitly led him into a categorical acquiescence with the statement of the Examiner that he had in mind prosecution for violation of a state law, and not a federal law. Each time, after appellee refused to answer a question because the answer might incriminate him, the attorney suggested: "And in stating that you refuse to answer because you might give information

which might incriminate or degrade yourself you have in mind the violation of a state law, and not a federal law." This was a deliberate act on the part of his questioner to deprive him of the protection of the constitutional privilege with which he was earnestly attempting to shield himself, and was in direct violation of the rule stated by this Honorable Court in Counselman v. Hitchcock, 142 United States 547, where it is said:

> "It is an ancient principle of the law of evidence that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures."

We respectfully submit to this Honorable Court that, inasmuch as no question of state concern was being investigated at the hearing conducted by the revenue agent, there was no justification for the repeated suggestion of counsel who conducted the examination that appellee had in mind the violation of a state law, and not violation of a federal law. When, upon being asked a question that plainly could have elicited an answer tending to subject appellee to criminal prosecution in a federal court, and he refused to answer upon the ground that his answer might incriminate him, the questioner should have gone no further. He should not have tried to destroy appellee's asserted claim with the suggestion that the only apparent danger was prosecution for violation of a state law. Chief Justice Marshall said in Burr's Trial (1 Burr's Trial 244):

> "If the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be to answer the question or not. If, in such a case, he say upon his oath, that his answer would criminate him, the Court can demand no other testimony of the fact."

In this case appellee said, on his oath, that his answer would (might) incriminate him. When he said this, the investigator should have demanded no further testimony and no further explanation of appellee's claim of privilege.

This record clearly shows that, throughout the entire hearing, he earnestly tried to bring himself within the protection of that part of the Fifth Amendment which provides that no person "shall be compelled in any criminal case to be a witness against himself."

His answers throughout disclose an attempt to avail himself of the privilege, but ignorance of exactly how to make the claim.

The record shows that the attorney who represented appellee at the hearing did not properly or sufficiently advise appellee of how to word his claim in order to make it effective.

Preceding the examination of appellee there was a colloquy between the attorney representing the Internal Revenue Department and counsel who at that time appeared for appellee. This is set forth verbatim in the record.

After submitting a statement accounting for some of the money which the revenue agent intended to ask about, and stating that appellee was willing "to let such amounts be restored to taxable income," counsel for appellee said:

> "This taxpayer did not know that a detailed report of such disbursements was required by the internal revenue authorities until said detailed report was recently requested of him by the revenue agent, Mr. Kirk. He has referred such request to his attorneys for investigation, and his attorneys find that form 1099 and accompanying affidavit required on form 1096 require a statement of all disbursements made in operating a business and does not provide a method whereby the report can be made in cases where, if made, the taxpayer making same would be held to give information which would tend to incriminate and degrade him and may lay him liable for prosecution for criminal offenses, for imprisonment, fines, penalties and forfeitures, and notwithstanding the Constitution of the United States protects the taxpayer to the extent that it will not require him to give information against himself touching such matters, or that may form a link in a chain of circumstances that might be sought as evidence against the person giving same. * * *. The taxpayer is willing to prepare and execute form 1099, giving the names of persons and amounts paid to them, respectively, who are engaged in actually assisting taxpayer in operating his business, and this information has just been furnished heretofore in this statement, and as to other disbursements made in the operation of his business which taxpayer cannot give without tending to incriminate and degrade himself,

taxpayer is willing to let such amounts be restored to taxable income if the internal revenue authorities believe that they were not proper business deductions" (Rec., pp. 18-19).

Counsel for the Internal Revenue Department then asked appellee's attorney this question: "I would like to ask Mr. Moore at this time whether he has criminal prosecution under state law or whether criminal prosecution under federal law in mind in arriving at the opinion he has just stated?" To this Mr. Moore replied: "I do not think I am required to answer that." After further discussion, Mr. Moore finally said: "I think I would state that we have particularly in mind a state law."

Following this the examination of appellee began. On page 20 of the record appears appellee's first refusal to answer a question. He stated that he refused to answer on the ground that he might give information that might incriminate and degrade him. Thereupon he was asked if he had in mind the violation of a federal law or state law. To this he replied: "A state law." Counsel then asked him: "And not a federal law? Is that right, Mr. Murdock?" Appellee replied: "Not that I know of." Thereupon counsel who represented appellee said: "I object to that question on the ground that it is immaterial; that the Government has no right to insist upon an answer as to what would be a state or federal statute in connection with which the witness might tend to incriminate himself."

We respectfully submit that it was manifestly unfair to

require appellee to specify what particular law, or kind of law, might be used to effect a criminal prosecution of him in the event that he answered the questions which he refused to answer. The result of these tactics was to defeat and destroy the efficacy of the constitutional protection with which he was attempting to shield himself and with which he was clearly entitled to be protected. He stated that answers to the questions might incriminate him. Inasmuch as the questions concerned only federal matters, they could have incriminated him only within the federal jurisdiction. This was a fact that was undoubtedly known to counsel who examined appellee, but which could hardly be expected to be known to a layman. Although ignorance of the law is ordinarily no defense, we respectfully submit that this familiar rule has never been carried to the extreme length of indulging against a lay citizen, with no legal training, the presumption that he knows and understands what particular criminal statutes may jeopardize him, and what particular jurisdiction may become the venue of a possible future prosecution of him. If he is required, after refusing to answer on the ground that his answer might incriminate him, to specify the jurisdiction in which he may be criminally prosecuted, he is compelled, at his own risk, to distinguish between legal niceties that may puzzle men trained in the law, and he is denied the protection that the Fifth Amendment is intended to give.

If the questions asked of appellee did not concern fed-

eral matters alone, if they were so innocent and touched upon such innocent subjects that there could be no reasonable danger of a criminal prosecution following answers being given to them, the refusal of a witness to answer them upon the ground that his answers might tend to incriminate him would be preposterous and untrue, and should be construed to constitute a willful and deliberate intention upon the part of the witness to refuse to give information. But if the questions so clearly and indisputably affect matters of federal concern, to wit, a citizen's sworn income tax return, that it is apparent to everyone that the answers of the witness would probably subject him to criminal prosecution in a federal court for perjury, and for defrauding the Government in violation of certain penal provisions of the Internal Revenue Law, the claim of the witness to the privilege of silence on the ground that his answers might incriminate him should be accepted, and the examination should stop. The witness should not be goaded or tricked by his examiner into conceding or agreeing that he had in mind prosecution in a state court, and not in a federal court.

For these reasons we respectfully submit that appellee's refusal to answer was predicated upon a claim broad enough to include the protection of the Fifth Amendment to the Constitution of the United States, and should not be construed to have been a waiver of that protection.

We further respectfully submit that in the case of Ballman v. Fagin, 200 U. S., page 186, this Honorable Court

held that the protection afforded by the Fifth Amendment is broad enough to justify a citizen in refusing to answer a question that might subject him to prosecution in a state court for violation of a state law. In that case your Honors said:

> "Not impossibly Ballman took this aspect of the matter for granted, as one which would be perceived by the Court without his disagreeably emphasizing his own fears. But he did call attention to another less likely to be known. As we have said, he set forth that there were many proceedings on foot against him as party to a bucket shop, and so subject to the criminal law of the state in which the grand jury was sitting. According to United States v. Saline Bank, 1 Peters 100, he was exonerated from disclosures which would have exposed him to the penalties of the state law."

We once more respectfully ask leave to call the attention of this Honorable Court to our contention that the effect of the demurrer filed by the Government to the sworn special plea of appellee was to admit the truth of the averments of the plea. The allegation contained in that plea was that appellee did not answer the questions because, if he had answered them, he would have given information which would have incriminated and degraded him, and have compelled him to become a witness against himself in a criminal case in violation of the Fifth Amendment to the Constitution of the United States, and have caused him to be subject to prosecution in a federal court

for violations of various laws of the United States (Rec., p. 15). In County of Dallas v. MacKenzie, 94 U. S. 660, it is said:

> "We think the plaintiff erred in demurring to the answer and thus admitting that the County Court had never exercised its power. * * * Instead of meeting this allegation by an issue of fact, the plaintiff by demurring admits its truth; and we do not see how, upon the pleadings, he can be deemed a holder for value."

In Sullivan v. Iron Silver Mining Co., 109 U. S. 550, it is said:

> "The fact that the vein or lode was known to exist as contemplated by the statute being well pleaded, although in general terms, is admitted by the demurrer (Eaton v. Southby Willes, 131; Postmaster General v. Ustick, 4 Wash. C. C. 347; Christmas v. Russell, 5 Wall. 290). In order to present the issue discussed in argument, the plaintiff should either have traversed the allegation or have replied that no claim for the vein or lode had been elected at the time in question."

In Fish v. McGann, 205 Ill. 179, at page 184, it is said:

> "A demurrer to a pleading admits the truth of the facts well pleaded, though it does not admit the conclusion sought to be drawn from them by the pleader (Compher v. People, 12 Ill. 290; Greig v. Russell, 115 id. 483; County of Christion v. Merigan, 191 id. 483). Where, as in the case here, a demurrer is interposed to a pleading, which the Court overrules, and the de-

fendant elects to abide by the demurrer, the judgment thereupon filed is conclusive of the facts confessed by the demurrer, and no proof of such facts is necessary other than that appearing upon the record. The facts alleged in the pleading are in such case admitted of record by the judgment of the Court upon the demurrer."

The following are a few of the cases in which this Honorable Court has held that the allegations of a pleading are to be taken as true on demurrer thereto:

U. S. v. U. P. R. Co., 98 U. S. 569;
Warren v. King, 108 U. S. 389;
Hyer v. Richmond Traction Co., 168 U. S. 471;
Rhode Island v. Mass., 15 Pet. 233;
Bacon v. Rives, 106 U. S. 99;
Angle v. Chicago, St. P. M. & O. R. Co., 151 U. S. 1.

We respectfully submit that if the Government intended to claim that appellee had waived his right to claim his constitutional privilege of refusing to divulge information that might tend to incriminate him it should have pleaded this by replication. By demurring to appellee's plea and electing to stand by the demurrer the Government admitted the truth of the plea, and should be held to be precluded from asserting that appellee waived his right to claim the protection of the Constitution as a justification for his refusal to answer.

In the opinion in this case your Honors state that leave to file the sworn special plea should have been withheld. You hold that the defense set up in the sworn special plea

was a matter of defense determinable under the general issue. Although this is true, we respectfully call attention to the fact that both the Government and the District Court considered the filing of this plea to constitute proper procedure in this case, and did not question or challenge the right of appellee to present the matters of defense set forth in the plea in that manner. Both appellee and the prosecution joined in this erroneous practice. The plea presented only a question of law. It did not present any question of fact to be determined by a jury. It was for this reason that counsel for appellee raised it by plea in order to crystalize an issue to be passed upon by the Court.

The section of the Revenue Act under which the internal revenue agent subpoenaed appellee and then attempted to compel him to give information concerning his income tax returns is unconstitutional because it does not confer upon a taxpayer, when required to disclose information in the form of testimony, immunity from indictment and prosecution based upon facts elicited from such testimony. This Honorable Court said, in Counselman v. Hitchcock, 142 U. S. 547:

> "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the incriminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States. * * * In view of the constitutional provision, a statutory enactment, to be valid, must afford abso-

lute immunity against future prosecution for the offense to which the question relates."

The statute which authorized the summoning of appellee, and by virtue of which the internal revenue agent required appellee to appear and testify, did not afford any immunity against future prosecutions for any offenses learned about through the medium of such compulsory examination of him. We respectfully submit that, inasmuch as the statute itself is clearly repugnant to the Fifth Amendment of the Constitution, an incongruous and anomalous situation arises when it is contended that appellee waived his right to claim constitutional protection from disclosing information at a hearing conducted pursuant to the invalid statute, or that he was required to make any claim under the circumstances.

The opinion of this Honorable Court in this case disposes of appellee's defense. The remanding of the case to the District Court for a jury trial is a mere formality, because nothing is left for a jury to decide. With the opinion of your Honors holding that appellee waived his right to avail himself of the protection of the Fifth Amendment to the Constitution, the trial court will be bound to direct the jury to find appellee guilty.

We respectfully submit that we earnestly believe that the record of this case shows that appellee attempted in the best way that he knew to avail himself of the protection of the Fifth Amendment, and that he did not at any

time intend to waive the privilege of standing upon his constitutional right to refuse to divulge information that might incriminate him. For this reason we humbly and respectfully petition this Honorable Court to restore this case to the docket and to grant appellee a rehearing.

Respectfully submitted,

EDMUND BURKE,
Springfield, Illinois,
HAROLD J. BANDY,
Granite City, Illinois,
Attorneys for Appellee.

Edmund Burke of Springfield, Illinois, and Harold J. Bandy of Granite City, Illinois, attorneys for Harry Murdock, appellee in the above-entitled case, herewith certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

Dated this 15th day of December, A. D. 1931.

Edmund Burke,
Springfield, Illinois.
Harold J. Bandy,
Granite City, Illinois.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 38.—October Term, 1931.

The United States of America, Appellant, *vs.* Harry Murdock.	Appeal from the District Court of the United States for the Southern District of Illinois.

[November 23, 1931.]

Mr. Justice Butler delivered the opinion of the Court.

Appellee filed his individual federal income tax returns for 1927 and 1928, and in each year deducted $12,000 which he claimed to have paid to others. An authorized revenue agent summoned appellee to appear before him and disclose the recipients. Appellee appeared but refused to give the information on the ground that to do so might incriminate and degrade him.

He was indicted for such refusal and interposed a special plea averring that he ought not to be prosecuted under the indictment because, if he had answered the questions put to him, he would have given information that would have compelled him to become a witness against himself in violation of the Fifth Amendment and caused him to be subjected to prosecution in the court below for violation of various laws of the United States, as shown by a transcript of the questions asked and answers given which he included in his plea. The United States demurred to the plea on the grounds that it fails to show that the information demanded would have incriminated or subjected defendant to prosecution under federal law, and that defendant waived his privilege under the Fifth Amendment. The court overruled the demurrer and entered judgment discharging defendant.

The judgment necessarily determined that to require defendant to supply the information called for would be to compel him to incriminate himself and that therefore he did not unlawfully or willfully refuse to answer. Its effect, unless reversed, is to bar further prosecution for the offense charged. It follows un-

questionably that, without regard to the particular designation or form of the plea or its propriety, this court has jurisdiction under the Criminal Appeals Act.[1] *United States* v. *Barber*, 219 U. S. 72, 78. *United States* v. *Oppenheimer*, 242 U. S. 85. *United States* v. *Thompson*, 251 U. S. 407, 412. *United States* v. *Storrs*, 272 U. S. 652, 655. *United States* v. *Goldman*, 277 U. S. 229, 236.

The offense charged is defined: "Who willfully fails to . . . supply such information [for the computation of any tax imposed by the Act] at the time or times required by law or regulations, shall . . . be guilty of a misdemeanor".[2] Other provisions authorize resort to the district courts to compel attendance, testimony and production of books.[3] While undoubtedly the right of a witness to refuse to answer lest he incriminate himself may be tested in proceedings to compel answer, there is no support for the contention that there must be such a determination of that question before prosecution for the willful failure so denounced. By the very terms of the definition the offense is complete at the time of such failure.

Immediately in advance of the examination, appellee's counsel discussed with counsel for the Internal Revenue Bureau the matter of appellee's privilege against self-incrimination and stated that he had particularly in mind incrimination under state law. And at the hearing appellee repeatedly stated that, in answering: "I might incriminate or degrade myself", he had in mind "the

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[1] "A writ of error may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit: . . .

"From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." 18 U. S. C., § 682. 34 Stat. 1246. See also 28 U. S. C., p. 345 (2).

[2] "Any person required . . . to . . . supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to . . . supply such information, at the time or times required by law or regulations, shall . . . be guilty of a misdemeanor . . .". 26 U. S. C., § 1265. § 1114 (a), Revenue Act of 1926, 44 Stat. 116; 26 U. S. C., § 2146; § 146 (a), Revenue Act of 1928, 45 Stat. 835.

[3] 26 U. S. C., §§ 1257, 1258; 1122 (a) (b), Revenue Act of 1926, 44 Stat. 121. Superseded by 26 U. S. C., § 2617; § 617, Revenue Act of 1928, 45 Stat. 877.

violation of a state law and not the violation of a federal law". The transcript included in the plea plainly shows that appellee did not rest his refusal upon apprehension of, or a claim for protection against, federal prosecution. The validity of his justification depends, not upon claims that would have been warranted by the facts shown, but upon the claim that actually was made. The privilege of silence is solely for the benefit of the witness and is deemed waived unless invoked. *Vajtauer* v. *Comm'r of Immigration*, 273 U. S. 103, 113.

The plea does not rest upon any claim that the inquiries were being made to discover evidence of crime against state law. Nothing of state concern was involved. The investigation was under federal law in respect of federal matters. The information sought was appropriate to enable the Bureau to ascertain whether appellee had in fact made deductible payments in each year as stated in his return, and also to determine the tax liability of the recipients. Investigations for federal purposes may not be prevented by matters depending upon state law. Constitution, Art. VI, § 2. The English rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country. *King of the Two Sicilies* v. *Willcox*, 7 State Trials (N. S.) 1050, 1068. *Queen* v. *Boyes*, 1 B. & S. 311, 330. This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination. *Counselman* v. *Hitchcock*, 142 U. S. 547. *Brown* v. *Walker*, 161 U. S. 591, 606. *Jack* v. *Kansas*, 199 U. S. 372, 381. *Hale* v. *Henkel*, 201 U. S. 43, 68. As appellee at the hearing did not invoke protection against federal prosecution, his plea is without merit and the government's demurrer should have been sustained.

We are of opinion that leave to file the plea should have been withheld. The proceedings below are indicated by a chronological statement printed in the margin.[4] After demurrer—not shown by the record to have been disposed of—and motions for a bill of particulars and to suppress evidence which were denied, a plea of not guilty was entered. The case should then have been tried without further form or ceremony. 18 U. S. C., § 564. The matters set forth in the plea were mere matters of defense determinable under the general issue. Federal criminal procedure is governed not by state practice but by federal statutes and decisions of the federal courts. *United States* v. *Reid*, 12 How. 361. *Logan* v. *United States*, 144 U. S. 263, 301. *Jones* v. *United States*, 162 Fed. 417, 419. *United States* v. *Nye*, 4 Fed. 888, 890. Neither require such piecemeal consideration of a case. A special plea in bar is appropriate where defendant claims former acquittal, former conviction or pardon (2 Bishop New Criminal Procedure (2d ed.) §§ 742, 799, 805 et seq.) but there is no warrant for its use to single out for determination in advance of trial matters of defense either on questions of law or fact. That such a practice is inconsistent with

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[4] *1930*

January	23	Indictment returned.
February	6	Demurrer to indictment.
February	19	Additional special ground for demurrer.
February	25	Motion for bill of particulars.
May	27	Motion to suppress evidence and to restrain its use at trial.
		Motion for bill of particulars denied.
		Arraignment and plea of not guilty.
June	10	Argument on motion to suppress.
June	21	Motion to suppress denied.
July	1	Leave granted to file special plea.
		Special plea filed.
October	1	Demurrer to plea filed and hearing thereon set for October 13.
October	13	Second and third special pleas filed.
October	17	Demurrer to second and third special pleas filed.
		Hearing on demurrers.
October	18	Demurrer to first special plea overruled; demurrers to second and third special pleas sustained.
October	28	Opinion on demurrers.
1931		
February	3	Plea of not guilty withdrawn.
		Judgment for defendant on first special plea.
March	4	Appeal allowed.

prompt and effective administration of the law and is likely to result in numerous hearings, waste of courts' time and unnecessary delays is well illustrated by the record in this case. The indictment was returned January 23, 1930, the judgment before us was entered more than a year later, and it seems certain that more than two years will have elapsed after indictment before the case can be reached for trial.

Judgment reversed.

A true copy,

Test:

Clerk, Supreme Court, U. S.